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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 154.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CERTIFICATE FILED APRIL 11, 1898.
CERTIORARI AND RETURN FILED JANUARY 8, 1898.

(16,252.)

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(2.) That the plaintiff is, and ever since the 15th day of March, 1887, has been, the owner of certain premises situated in Saguache county, in the State of Colorado, known as Baca Grant No. 4, described as follows: Beginning at a point on the eastern edge of the San Luis valley, where the thirty-eighth degree of latitude crosses the dividing line of the plain and mountain; thence east, along the said parallel of latitude, four and one-half miles; thence south, at a right angle to said parallel of latitude, twelve and one-half miles; thence west, at a right angle, twelve and one-half miles; thence north, at a right angle, twelve and one-half miles, to the aforesaid parallel of latitude; thence east, with said parallel
2 of latitude, eight miles, to the place of beginning, containing 99,289.39 acres; and is the owner of the following specifically described premises, situated within the outer boundaries of said Baca Grant No. 4, aforesaid, to wit: Section twenty-two (22) township one (1) north, one (1) east, according to the plat of said Baca Grant No. 4, as filed and recorded in the office of the county clerk and recorder of said Saguache county, and including in said section twenty-two, certain mineral-bearing *bearing* property designated by the defendant as the Eastern Star mine, with other mining lands adjacent thereto within said section twenty-two.

(3.) That the plaintiff's title to the premises hereinabove described is that of an estate in fee-simple.

(4.) That the plaintiff has been, ever since the said 15th day of March, 1887, and now is, entitled to the possession of the said premises hereinabove described, and every part thereof.

(5.) That heretofore and on or about the 15" day of March, 1890, while the plaintiff was in the possession of the said premises, and entitled to the possession thereof, the defendant wrongfully and unlawfully entered into and upon the said premises, last hereinabove described, to wit, section twenty-two, township one north, one east, within the boundaries of the said Baca Grant No. 4, and did oust the plaintiff therefrom, and the said defendant has since wrongfully and unlawfully withheld, and still doth wrongfully and unlawfully withhold, possession thereof from the plaintiff, to the plaintiff's damage in the sum of five thousand dollars.

(6.) And plaintiff alleges that the matter in dispute in this cause arises under the laws of the United States, in this, to wit: that the plaintiff's title is based upon an act of Congress, approved June 21st, 1860, entitled "An act to confirm certain private land claims in the Territory of New Mexico," by which act the heirs of Luis Maria Baca, plaintiff's remote grantors, were authorized to select a certain quantity of "vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number," under and by virtue of which said act, and within three years after the passage thereof, plaintiff's remote grantors, the heirs of said Luis Maria Baca, did select and locate the lands hereinabove described as Baca Grant No. 4, including the premises now in controversy between the plaintiff and defendant, all of which said lands, included within said Baca Grant No. 4, were at the time of the passage of said act, within the then boundaries of the Terri

tory of New Mexico, and the location of the same was ap-
3 proved by the proper officers of the Land Department of the United States, and said land was, by the surveyor general of the State (then Territory) of Colorado, thereunto duly authorized, certified to be non-mineral land; and the plaintiff claims that, by virtue of said statute, and the finding of said surveyor general as to the non-mineral character of said land, at the time of its selection and location, the title to all of said premises passed to the heirs of Luis Maria Baca, and through them, by divers conveyances, to this plaintiff, notwithstanding the fact of subsequent discoveries of precious metals within the boundaries of the said Baca Grant No. 4, hereinabove described.

The defendant, on the other hand, claims and asserts, that, under the proper construction of said act of Congress of June 21st, 1860, hereinabove referred to, and notwithstanding the finding of the surveyor general of the State (then Territory) of Colorado, as to the non-mineral character of said lands, at the time of the selection and location thereof, as said Baca Grant No. 4, the subsequent discovery of precious metals, to wit, silver and gold, upon that portion of the said grant by the said defendant so taken possession of and occupied, excludes from said grant the premises by him so taken possession of, and that this plaintiff has no right thereto.

Wherefore, plaintiff prays judgment:

(1.) For the recovery of the possession of those certain premises situate within the boundaries of said Baca Grant No. 4, and designated on the plat thereof as section twenty-two, township one north, one east, including all those premises within the boundaries of said Baca Grant No. 4, designated by the defendant as the Eastern Star mine, with adjacent mining property held by the said defendant within the boundaries of said section twenty-two.

(2.) For five thousand dollars damages, as aforesaid.

(3.) For all costs of this suit.

WOLCOTT & VAILE,
Attorneys for Plaintiff.

STATE OF COLORADO, }
County of Arapahoe, } ss:

George H. Adams, being first duly sworn, deposes and says:

That he is the agent and attorney-in-fact for the plaintiff, Quincy A. Shaw, within named, and makes this verification by reason
4 of the absence of the said Quincy A. Shaw from the State and district of Colorado; that affiant has read the foregoing complaint, and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

GEORGE H. ADAMS.

Subscribed and sworn to before me, this 24th day of June, A. D. 1893.

[SEAL.] A. J. TRUSSELL,
Notary Public.

My commission expires Dec. 8th, 1896.

(Indorsed:) 2978. United States circuit court, district of Colorado. Quincy A. Shaw, plaintiff, *vs.* Murry M. Kellogg, defendant. Complaint. Filed July 3, 1893. Robert Bailey, clerk. Wolcott & Vaile, att'ys for plaintiff.

And the said summons and proof of service *is* in words and figures as follows, to wit:

Summons.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

Complaint filed in the clerk's office this 3d day of July, A. D. 1893.

QUINCY A. SHAW, Plaintiff,
versus
MURRY M. KELLOGG, Defendant.

The President of the United States of America to the above-named defendant, Greeting:

You, and each of you, are hereby notified that an action has been brought in said court, by Quincy A. Shaw, plaintiff, against you as defendant to recover the possession of those certain premises situated within the boundaries of the Baca Grant No. 4, and designated on the plat thereof as section twenty-two, township one north, one east, including all those premises within the boundaries of said Baca Grant No. 4, designated by the defendant as the Eastern Star mine, with adjacent mining property, for $5,000 damages and for the costs of this suit, as more particularly set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service, and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 3d day of July, A. D. 1893, and of the Independence of the United States the 117th year.

ROBERT BAILEY, *Clerk.*

Proof of Service.

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

DENVER, *July* 6, *A. D.* 1893.

I hereby certify, that I received the within writ on the 4th day of July, A. D. 1893, and that I have personally served the same upon the said defendant Murry M. Kellogg by delivering to Murry M. Kellogg personally, a true copy of the within writ, and a copy of the complaint at the time and place as follows: At Moffat, county of Saguache, on the 5th day of July, A. D. 1895.

This writ therefore returned executed as the law directs, this 6th day of July, A. D. 1893.

A. H. JONES, *Marshal,*
By R. B. WARWICK,
Deputy Marshal.

Marshal's Fees.

2 service- 1 defendants, at $2	$4.00
Mileage 265 miles at 6c. going only	15.90
Expenses	2.75
	$19.90
Total	22 65

(Indorsed:) No. 2978. Circuit court of the United States for the district of Colorado. Quincy A. Shaw, plaintiff, *versus* Murry
6 M. Kellogg, defendant. Summons. Filed this 6th day of July, A. D. 1893. Robert Bailey, clerk. Wolcott & Vaile, of Denver, attorneys for plaintiff.

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

Demurrer.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff, }
vs.
MURRY M. KELLOGG, Defendant. }

Now comes the said defendant and demurs to the complaint of the plaintiff herein and for cause thereof says:

First. That the complaint does not state facts sufficient to constitute a cause of action.

Second. That the said complaint is ambiguous and uncertain in this:

1st. That it alleges that the plaintiff has title in fee to the premises in controversy.

2nd. That it alleges that the title is still in the United States and

that he has received no patent for it, but that he derives his title from the Bacca Grant No. 4, without alleging that said grant as claimed by the plaintiff and located by the surveyor has ever been approved by Congress or the Land Department of the Government, and without alleging that the premises in controversy was non-mineral land at the time of the location of the grant or at the present time.

3rd. That the complaint does not allege that the plaintiff or his grantor has ever received a patent from the Government.

4th. That the complaint does not allege that the plaintiff or his grantor in the location of the Bacca Grant No. 4 has complied with the law of Congress authorizing said location, either in general terms or by specifically setting out the acts done by him or his grantor or by the surveyor in the location of said grant, and that said complaint is a suit brought in terms for a mining claim and does admit that the part of the grant sought to be recovered from the defendant is mineral land.

Third. Said complaint is uncertain in this: That it does not show the time of the alleged entry by defendant upon the said premises.

JOHN W. BLACKBURN,
JOHN R. SMITH,
Attorneys for said Defendant.

7 (Indorsed:) No. 2978. In the circuit court, district of Colorado. Quincy A. Shaw, plaintiff, *vs.* Murray M. Kellogg, defendant. Demurrer to complaint. Filed Aug. 3, 1893. Robert Bailey, clerk U. S. circuit court. John W. Blackburn, John R. Smith, attorneys for defendant.

44th day.

FRIDAY, *January 5th, A. D.* 1894.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 7th day of November last past.

Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs.
MURRY M. KELLOGG. } 2978.

At this day comes the said plaintiff by J. F. Vaile, Esq., his attorney, and the said defendant in his own proper person also comes.

And the demurrer to the complaint coming on now to be heard is argued by counsel and the court being now sufficiently advised in the premises it seemeth to the court now here that the said complaint is sufficient in law, and so the said demurrer is overruled.

And thereupon it is ordered by the court that the said defendant answer herein within thirty (30) days from this day.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Answer and Cross-complaint.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff, }
vs.
MURRAY M. KELLOGG, Defendant. }

The defendant Murray M. Kellogg, for answer to plaintiff's complaint herein, denies:

That the plaintiff is, or ever since the 15th day of March, 1887, or at any other time has been the owner of certain premises situated in Saguache county, in the State of Colorado, known as Baca Grant No. 4, as described in said complaint, denies that plaintiff is the owner of the following specifically described premises, or any
8 part thereof, situated within the outer boundaries of said Baca Grant No. 4, to wit: section 22, township 1 north, 1 east according to the plat of said Baca Grant No. 4, as filed and recorded; denies that plaintiff is the owner of a certain mineral-bearing property designated by the defendant as the Eastern Star mine, or any part thereof, or other mining lands adjacent thereto, within said section 22.

Defendant states affirmatively that whatever pretended title plaintiff may have to any part of said Baca Grant No. 4 is in fact a mortgage to secure the payment of a certain sum of money from the real owner or owners of said property.

Defendant denies that plaintiff's title to the premises hereinbefore described is that of an estate in fee-simple, or any other title whatever.

Defendant denies that plaintiff has been, ever since the 15th day of March, 1887, or at any other time, or now is, entitled to the possession of the premises above described, or any part thereof.

Defendant denies that on or about the 15th day of March, 1890, or at any other time, while the plaintiff was in the possession of the said premises, or entitled to the possession thereof, that the defendant wrongfully or otherwise, or unlawfully entered into or upon the said premises above described, to wit: section 22, township 1 north, 1 east, within the boundaries of said Baca Grant No. 4; denies that defendant did oust the plaintiff therefrom, or any part thereof; denies that the defendant wrongfully or unlawfully withholds the possession from plaintiff, to plaintiff's damage in the sum of five thousand dollars or any sum whatever.

Defendant denies that the heirs of Louis Marie Baca, or any other persons, under the laws of the United States, within three years from June 21st, 1860, did locate or select the lands above described as Baca Grant No. 4, including the premises now in controversy between plaintiff and defendant or any part thereof; and alleges that the east and north lines of said alleged grant were not con-

nected on the ground or the northeast corner of said survey set or determined, or the said survey, or the lines thereof closed.

Defendant denies that the location of the lands in controversy, or any part thereof, was approved by the proper officers of the Land Department of the United States; denies that the surveyor general of Colorado was authorized to, or did, certify that the lands in controversy or any part thereof *was* non-mineral land; and alleges the fact to be that said lands, at the time of alleged location, were, and were known to be, mineral lands.

9 Wherefore defendant demands that plaintiff's action be dismissed, and that defendant have judgment for costs herein.

Second count.

Defendant, for a further and affirmative answer to plaintiff's complaint herein alleges:

That for more than ten years continuously, next prior to the commencement of this action, defendant and his grantors have been in the actual, exclusive, open and notorious possession of said Eastern Star mine, described in plaintiff's complaint, under color of title and claim of right, against the claims of the whole world, and particularly the plaintiff and his grantors, and that during all of said years no taxes could lawfully be assessed against said premises, and none were so assessed.

Wherefore defendant prays that he have judgment:

First. That he is the owner of and entitled to the possession of the premises above described, with the appurtenances.

Second. For such other and further relief as to equity seems just and for costs of suit herein.

Third count.

Defendant states as a third count and further cause of action against the plaintiff, and as a cross complaint herein:

That on the 24th day of April, 1876, the land where the Eastern Star mine is located was unappropriated public mineral land of the United States, and as such, subject to exploration, and location; that on that day Francois Herard, Ulysses Herard, and Howard O. Horne, citizens of the United States, went upon said ground and discovered the Eastern Star vein, bearing gold and silver; that after said vein had been opened by a tunnel for thirty feet, showing a well-defined vein of quartz, bearing gold and silver in rock in place, said parties properly surveyed the surface of said claim, and marked the boundaries thereof by placing a location notice at point of discovery and setting a substantial stake at each corner, and the center of each side line properly marked so that the boundaries of said claim could be readily traced and found upon the ground, and afterwards, to wit: on the 17th day of June, 1876, filed for record in the office of the county recorder of Saguache county, Colorado, a location certificate of said mine, in words and figures following, to wit:

"TERRITORY OF COLORADO, } ss:
County of Saguache, }

Know all men by these presents, that the undersigned have this 24th day of April, 1876, claimed by right of discovery and location fifteen hundred feet linear and horizontal measurement in length and three hundred feet in width on the Eastern Star lode, along the vein thereof, with all its spurs, dips, variations and angles, and one hundred and fifty feet in width on each side of said lode, together with all other lodes, veins and ledges, the top or apex of which lies within the surface boundary lines of said mining claim, and together with all surface grounds allowed by law, three hundred feet of said lode so located, lying and being N. 55 degrees W. of the discovery stake on said lode, and 1,200 feet being S. 55 degrees east of said stake, said lode and mining claim being situated in the Eldorado mining district in the county of Saguache and Territory of Colorado, the location and bounds of said mining claim being marked and described more particularly as follows, to wit: Said lode being located on Gold hill, commencing about fifty feet south of the Cottonwood creek Sangre de Christo, said discovery tunnel is drove on the center of the crevice of said vein, lode or ledge thirty feet deep from the lowest part of the vein thereof at the surface, and the boundaries of said mining claim are duly marked as required by law with six substantial posts, one at each corner, and one at the center of each side boundary line of said mining claim. Said lode and mining claim was discovered, staked, located, and due and legal notice thereof posted at the point of discovery on the 24th day of April, 1876, and with the interests in said location agreed upon and fixed as follows: Each claiming a one-third interest, Francois Herard, Ulysses Herard, and Howard O. Horne, and we having complied with all the requirements of law, and the mining rules and regulations, do hereby execute this certificate of location this 16th day of June, 1876."

Said location certificate was duly recorded in Book 4, page 140, of the county records of Saguache county, Colorado. That at least one hundred dollars' worth of labor or improvements were made or performed on said mine each and every year from that time by said locators or their successors in interest, to the present time.

That the defendant is the owner of said mining claim under said location, except as against the United States, and entitled to the undisturbed possession thereof.

Wherefore defendant prays for judgment, that the defendant is the owner of said Eastern Star mining claim, with the appurtenances thereto belonging, and entitled to the undisturbed possession thereof.

And for such other and further relief as to equity is just.

JOHN R. SMITH,
Attorney for Defendant.

nected on the ground or the northeast corner of said survey set or determined, or the said survey, or the lines thereof closed.

Defendant denies that the location of the lands in controversy, or any part thereof, was approved by the proper officers of the Land Department of the United States; denies that the surveyor general of Colorado was authorized to, or did, certify that the lands in controversy or any part thereof *was* non-mineral land; and alleges the fact to be that said lands, at the time of alleged location, were, and were known to be, mineral lands.

9 Wherefore defendant demands that plaintiff's action be dismissed, and that defendant have judgment for costs herein.

Second count.

Defendant, for a further and affirmative answer to plaintiff's complaint herein alleges:

That for more than ten years continuously, next prior to the commencement of this action, defendant and his grantors have been in the actual, exclusive, open and notorious possession of said Eastern Star mine, described in plaintiff's complaint, under color of title and claim of right, against the claims of the whole world, and particularly the plaintiff and his grantors, and that during all of said years no taxes could lawfully be assessed against said premises, and none were so assessed.

Wherefore defendant prays that he have judgment:

First. That he is the owner of and entitled to the possession of the premises above described, with the appurtenances.

Second. For such other and further relief as to equity seems just and for costs of suit herein.

Third count.

Defendant states as a third count and further cause of action against the plaintiff, and as a cross complaint herein:

That on the 24th day of April, 1876, the land where the Eastern Star mine is located was unappropriated public mineral land of the United States, and as such, subject to exploration, and location; that on that day Francois Herard, Ulysses Herard, and Howard O. Horne, citizens of the United States, went upon said ground and discovered the Eastern Star vein, bearing gold and silver; that after said vein had been opened by a tunnel for thirty feet, showing a well-defined vein of quartz, bearing gold and silver in rock in place, said parties properly surveyed the surface of said claim, and marked the boundaries thereof by placing a location notice at point of discovery and setting a substantial stake at each corner, and the center of each side line properly marked so that the boundaries of said claim could be readily traced and found upon the ground, and afterwards, to wit: on the 17th day of June, 1876, filed for record in the office of the county recorder of Saguache county, Colorado, a location certificate of said mine, in words and figures following, to wit:

"TERRITORY OF COLORADO, } ss:
County of Saguache, }

Know all men by these presents, that the undersigned have this 24th day of April, 1876, claimed by right of discovery and location fifteen hundred feet linear and horizontal measurement in length and three hundred feet in width on the Eastern Star lode, along the vein thereof, with all its spurs, dips, variations and angles, and one hundred and fifty feet in width on each side of said lode, together with all other lodes, veins and ledges, the top or apex of which lies within the surface boundary lines of said mining claim, and together with all surface grounds allowed by law, three hundred feet of said lode so located, lying and being N. 55 degrees W. of the discovery stake on said lode, and 1,200 feet being S. 55 degrees east of said stake, said lode and mining claim being situated in the Eldorado mining district in the county of Saguache and Territory of Colorado, the location and bounds of said mining claim being marked and described more particularly as follows, to wit: Said lode being located on Gold hill, commencing about fifty feet south of the Cottonwood creek Sangre de Christo, said discovery tunnel is drove on the center of the crevice of said vein, lode or ledge thirty feet deep from the lowest part of the vein thereof at the surface, and the boundaries of said mining claim are duly marked as required by law with six substantial posts, one at each corner, and one at the center of each side boundary line of said mining claim. Said lode and mining claim was discovered, staked, located, and due and legal notice thereof posted at the point of discovery on the 24th day of April, 1876, and with the interests in said location agreed upon and fixed as follows: Each claiming a one-third interest, Francois Herard, Ulysses Herard, and Howard O. Horne, and we having complied with all the requirements of law, and the mining rules and regulations, do hereby execute this certificate of location this 16th day of June, 1876."

Said location certificate was duly recorded in Book 4, page 140, of the county records of Saguache county, Colorado. That at least one hundred dollars' worth of labor or improvements were made or performed on said mine each and every year from that time by said locators or their successors in interest, to the present time.

That the defendant is the owner of said mining claim under said location, except as against the United States, and entitled to the undisturbed possession thereof.

Wherefore defendant prays for judgment, that the defendant is the owner of said Eastern Star mining claim, with the appurtenances thereto belonging, and entitled to the undisturbed possession thereof.

And for such other and further relief as to equity is just.

JOHN R. SMITH,
Attorney for Defendant.

TERRITORY OF UTAH, } ss:
County of Utah, }

M. M. Kellogg, being duly sworn, on oath states: I am defendant herein, and the statements contained in the foregoing answer and cross-complaint are true, of my own knowledge, except those matters stated on information and belief, as to those matters, I believe it to be true.

M. M. KELLOGG.

Subscribed and sworn to before me this 10 day of March, 1894.

[SEAL.] ELMER E. CORFMAN,
Notary Public.

My commission expires Oct. 5", 1894.

(Indorsed:) No. 2978. In the circuit court of the United States. Quincy A. Shaw, plaintiff, *vs.* Murray M. Kellogg, defendant. Answer and cross-complaint. Filed Mar. 12, 1894. Robert Bailey, clerk U. S. circuit court. Murray M. Kellogg, *pro se.* John R. Smith, attorney for defendant.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Demurrer.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff,
vs.
MURRAY M. KELLOGG, Defendant.

Comes now the plaintiff in the above entitled action and demurs to the second count of the defendant's answer to the complaint herein, designated as a further and affirmative answer to plaintiff's complaint, on the ground that said answer does not state facts sufficient to constitute a defense to plaintiff's cause of action.

WOLCOTT & VAILE,
Att'ys for Pl'ff.

(Indorsed:) 2978. United States circuit court, district of Colorado. Quincy A. Shaw, plaintiff, *vs.* Murray M. Kellogg,
12 defendant. Demurrer to 2d count of def't's ans. Filed May 17, 1894. Robert Bailey, clerk U. S. circuit court. Wolcott & Vaile, attorneys for plaintiff.

19th day, May term.

FRIDAY, *May 25th, A. D.* 1894.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the first instant.

Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs.
MURRAY M. KELLOGG. } 2987.

At this day comes the said plaintiff, by J. F. Vaile, Esq., his attorney and the said defendant by J. R. Smith, Esq., his attorney also comes.

And the demurrer to the second count of the answer, and the motion to strike out part of the said answer, coming on now to be heard, is argued by counsel, and the court being now sufficiently advised in the premises, it seemeth to the court now here, that said second count of the said answer is not sufficient in law and so the said demurrer is sustained, and it is ordered, for good and sufficient reasons to the court appearing that the motion to strike out part of the answer be and is hereby denied.

And thereupon on motion of the said defendant, it is ordered by the court, that he have leave to file an additional answer within five (5) days from this day.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Additional Answer.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff,
vs.
MURRAY M. KELLOGG, Defendant.

The defendant, Murray M. Kellogg, by leave of court first had, files this his additional answer to the plaintiff's complaint herein and for an affirmative defense thereto, alleges:

I.

That whatever title or pretended title the plaintiff may have to all or any part of said Baca Grant Number 4 is, in truth and fact, a mortgage to secure the payment of certain moneys due
13 from the real owner or owners of said property to the said plaintiff.

II.

Defendant alleges that the location, selection and survey of the lands described in the said complaint as being within and constituting Baca Grant Number 4, and including the premises now in controversy between the plaintiff and defendant, were not made located

or surveyed within three (3) years from and after June 21st, 1860, and that the survey of said Baca Grant Number 4, by the surveyor general of the United States, was not completed within the said three years, nor for many years thereafter and not, as defendant is informed and believes, until the summer of the year 1892. And defendant alleges that until the year 1892, the easterly one-fifth of the north exterior line of said alleged grant and the northerly two-thirds ($\frac{2}{3}$) of the east exterior line of said alleged grant were never in fact surveyed, ran or extended upon the grounds by an actual survey thereof, nor were the said lines connected upon the ground or the northeast corner of said survey set or determined, or the said survey or the lines thereof closed, or the said survey completed and finally approved by the officers of the Land Department of the United States; and that during all of said period and until the year 1892, it was wholly impossible and impracticable to ascertain or determine, from said survey, whether or not the lands and premises now in controversy between the plaintiff and defendant were within the exterior lines of said alleged grant, as surveyed and located.

And defendant alleges that at the time of the location by the grantors of this defendant of the Eastern Star mine, as in the answer herein more specifically described, and on, to wit, the 17th day of June, 1876, the said lands and premises had not been surveyed, as required in and by the act of Congress of June 21st, 1860; and that the failure to survey the said lands and premises, or to have them surveyed by the proper officers, was caused wholly by the negligence and inattention thereto of the plaintiff and his grantors.

III.

Defendant alleges that at the time of the alleged location and selection of said lands by the heirs of Louis Maria Baca, or their assigns, that portion of said grant now in controversy between this plaintiff and defendant was mineral land, valuable for gold, silver and other metals and valuable for nothing else, and was known to be mineral land; and on information and belief, defendant
14 alleges, was known to the locators of said lands to be mineral land, at the time of such pretended location.

Wherefore, defendant prays that the plaintiff's action be dismissed and that he have judgment for his costs herein.

JOHN R. SMITH,
Attorney for Defendant.

TERRITORY OF UTAH, }
County of Utah. }

M. M. Kellogg, being duly sworn, on oath says that he is the defendant herein and has read the foregoing additional answer; and that the matters therein stated are true of his own knowledge, except as to those stated on information and belief and as to those he believes it to be true.

M. M. KELLOGG.

Subscribed and sworn to before me this 31" day of May, 1894.
My commission expires Oct. 25", 1894.
[SEAL.] ELMER E. CORFMAN,
Notary Public.

(Indorsed:) No. 2978. In the U. S. circuit court, district of Colorado. Quincy A. Shaw *vs.* Murry M. Kellogg. Additional answer to complaint. Filed Jun- 4, 1894. Robert Bailey, clerk U. S. circuit court. John R. Smith, attorney for defendant.

UNITED STATES OF AMERICA, } *ss.*:
District of Colorado, }

Demurrer.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff, }
vs. }
MURRAY M. KELLOGG, Defendant. }

I.

The plaintiff above named demurs to paragraph numbered I in the additional answer filed by the defendant in the above-entitled cause, and for ground of demurrer says, that said paragraph numbered I does not state facts sufficient to constitute, or tending to constitute, a defence to the plaintiff's complaint.

II.

Plaintiff demurs to paragraph numbered II in the additional answer of the defendant filed in the above-entitled cause, and for ground of demurrer says, that said paragraph numbered II does not state facts sufficient to constitute, or tending to constitute, a defence to the plaintiff's complaint.

WOLCOTT & VAILE,
Plaintiff's Attorneys.

(Indorsed:) 2978. United States circuit court, district of Colorado. Quincy A. Shaw, plaintiff, *vs.* Murray M. Kellogg, defendant. Demurrer to answer & add'l answer of def't. Filed Nov. 20, 1894. Robert Bailey, clerk U. S. circuit court. Wolcott & Vaile, att'ys for plaintiff.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Reply.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff, }
vs.
MURRAY M. KELLOGG, Defendant. }

I.

The plaintiff, for reply to the third count of the defendant's original answer in the above-entitled cause, denies that, on the 24th day of April, 1876, or at any time subsequent thereto, or that for more than ten years prior thereto, the land where the Eastern Star mine is located was unappropriated, public, mineral land of the United States, or that, as such, the same was subject to exploration or location; that, whether or not on that day, to wit, April 24th, 1876, or at any other time, Francois Herard, Ulysses Herard and Howard O. Horne were citizens of the United States, or either of them was a citizen of the United States, or whether they or either of them went upon said ground and discovered the Eastern Star mine, bearing gold or silver, or whether afterwards any vein therein had been opened by a tunnel for thirty or any other number of feet, or whether the same was a well-defined vein of quartz, bearing gold or silver in rock in place; or whether said parties or either of them, properly or at all, surveyed the surface of said claim, or marked the boundaries thereof by placing location notice at point of discovery, or setting a substantial stake at each corner or at the center of each side line, properly marked, or otherwise, so that the boundaries of said claim could be readily traced or fixed upon the ground, or in any other manner located or marked said claim, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

That, whether or not one hundred dollars' worth of labor or improvements were performed or made on said mine, each
16 or any year from the time of the alleged location thereof, by the said locators, or their successors in interest, or by any one in their behalf, to the present time, or at all, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiff denies that the said defendant is the owner of said alleged mining claim under said location, or that the said defendant has any interest whatsoever therein, and denies that the said defendant is entitled to the undisturbed possession thereof, or any possession thereof whatsoever.

II.

For reply to the third paragraph of the defendant's additional answer, filed in this cause, the plaintiff denies that, at the time of

the alleged location and selection of said lands by the heirs of Luis Maria Baca, or their assigns, that portion of said ground now in controversy between plaintiff and defendant, was known to be mineral land, and denies that said lands were at that time, or at any time, valuable for nothing else than the gold, silver or other metals contained therein, and plaintiff denies that the said land was known to the locators thereof to be mineral land at the time of said location, that whether said lands are now more valuable for the minerals therein contained than for other uses or qualities this plaintiff has not and cannot obtain sufficient knowledge or information on which to base a belief.

Wherefore plaintiff asks judgment as in the original complaint demanded.

WOLCOTT & VAILE,
Plaintiff's Attorneys.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Joel F. Vaile, being duly sworn deposes and says: That he is the attorney for the plaintiff, Quincy A. Shaw, above named, and makes this affidavit by reason of the absence of the said Quincy A. Shaw, plaintiff, from the State of Colorado; that deponent has read the foregoing reply, and knows the contents thereof, and that the matters therein stated are true to the best knowledge, information and belief of this affiant.

JOEL F. VAILE.

Subscribed and sworn to before me, this 20th day of November, 1894.

[SEAL.] A. J. TRUSSELL,
Notary Public.

My commission expires Dec. 8th, 1896.

17 (Indorsed:) 2978. United States circuit court, district of Colorado. Quincy A. Shaw, plaintiff, *vs.* Murray M. Kellogg, defendant. Reply to answer and add'l answer. Filed Nov. 20, 1894. Robert Bailey, clerk U. S. circuit court. Wolcott & Vaile, att'ys for plaintiff.

22d day, November term.

SATURDAY, *December 1st, A. D.* 1894.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 6th day of November last past.

Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs. } 2978.
MURRY M. KELLOGG.

The demurrer of the plaintiff to the first and second additional answers of the defendant filed herein having heretofore come on to

be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it seemeth to the court now here, that the matters and things alleged in the first additional answer are not sufficient in law to be replied unto, and that the matters and things alleged in the second said additional answer are sufficient in law to be replied unto.

Wherefore it is ordered by the court that the demurrer to the first additional answer herein, be and the same is hereby sustained.

And it is further ordered by the court that the demurrer to the second additional answer, be and the same is hereby overruled.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Additional Replication.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff }
vs. }
MURRAY M. KELLOGG, Defendant. }

Comes now the plaintiff above named, and makes replication to the additional answer filed by the defendant in the above-entitled cause.

18 I.

For first replication to the second paragraph of said additional answer, the plaintiff denies that the selection of the lands described in the complaint as being within and constituting Baca Grant No. 4, was not made within three years from and after June 21st, 1860; and plaintiff denies that the location of said lands was not made within three years from and after June 21st, 1860.

And plaintiff says that it is not true that there was no survey made of said premises prior to the year 1892, or no final approval of such survey by the officers of the Land Department of the United States within said period, but, on the contrary, plaintiff alleges that said premises were surveyed in the year 1863, and that the survey thereof was duly approved by John Pierce, then surveyor general of the Territories of Colorado and Utah, on the 15th day of March, 1864.

Plaintiff denies that during all or any of the period mentioned in the said answer, subsequent to February 5th, 1863, or that until the year 1892, it was wholly or at all impossible or impracticable to ascertain or determine whether or not the lands and premises now in controversy between the plaintiff and defendant, were within the exterior lines of said grant as surveyed and located. And plaintiff denies that, at the time of the location by the grantors of the defendant, of the Eastern Star mine, or on, to wit, the 17th day of June, 1876, the said lands and premises had not been surveyed; and denies that any failure to survey the said lands and premises,

or to have them surveyed by the proper officers, was caused wholly or at all by any negligence or inattention on the part of the plaintiff or his grantors.

II.

Further replying to said second paragraph of the additional answer in the above-entitled cause, the plaintiff alleges, that the heirs of Luis Maria Baca were grantees of the United States, as to certain lands, under and pursuant to section 6 of an act of Congress entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21st, 1860; and had authority under said act to select vacant lands in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number, equal in amount to a certain tract of land theretofore claimed by the heirs of said Luis Maria Baca, at and in the vicinity of the town of Las Vegas, in the Territory of New Mexico; which right so to select such vacant lands was continued in force for three years from the said 21st day of June, 1860; and that, in and by
19 said act of Congress hereinabove mentioned, it was made the duty of the surveyor general of New Mexico to make a survey and location of the lands so selected by the said heirs of Baca when thereunto required by them.

And plaintiff alleges that, within said period of three years, and to wit, on the 5th day of February, 1863, the heirs of Luis Maria Baca, by one John S. Watts, as their attorney, duly filed in the office of the surveyor general of the Territory of New Mexico, an application for the survey and location of the following-described tract of land, to wit:

"Beginning at a point on the eastern edge of the valley of San Luis, where the 38th parallel of north latitude crosses the base of the snowy range, dividing the waters of the Rivers Arkansas and Del Norte; thence east, along said parallel, four and one-half miles; thence south, along a meridian line, twelve miles, thirty-six chains and forty-four links' distance; thence west at a right angle, twelve miles, thirty-six chains and forty-four links' distance; thence north to the specified parallel of latitude; thence east, with said parallel, to the place of beginning;"

which said application bore date of December 12th, 1862.

That on said 5th day of February, 1863, John A. Clark, then surveyor general of the Territory of New Mexico, duly executed his certificate to the effect that said application had been filed; that the tract of land therein designated was the one-fifth part of the claim confirmed to said heirs; that it contained 99,289 acres and $\frac{39}{100}$ of an acre, and that

"this location is the fourth of the series, and with the three locations heretofore made, numbered 1, 2 and 3, includes four-fifths of the said private claim confirmed to the heirs of the said Luis Maria Cabeza de Baca by the act of Congress approved June 21st, 1860."

And plaintiff alleges that, prior to the selection and location of

said lands as hereinabove mentioned, the Commissioner of the General Land Office of the United States, by written instructions to the surveyor general of New Mexico, transmitted on July 26th, 1860, directed the said surveyor general as follows:

"Should the Baca claimants select outside of the existing surveys, they must give such distinct description and connection with natural objects in their applications to be filed in your office, as will enable the deputy surveyor, when he may reach the vicinity of such selections in the regular progress of the surveys, to have the selections adjusted, as near as may be, to the lines of the public surveys, which may hereafter be established in the region of those selections."

That afterwards, and by an official communication to the surveyor general of Colorado, the said the honorable Commissioner of the General Land Office, advised the said surveyor general that, by the instructions hereinabove mentioned,

"it was plainly indicated that, should selections be made outside of the existing surveys, the survey thereof must be postponed until the vicinity is reached by the regular process of the public surveys."

And plaintiff alleges that, at the time of the selection of the lands constituting said Baca Grant No. 4, the same were outside of the existing surveys; that in the application for the same by the heirs of Luis Maria Baca, as aforesaid, there was given such distinct description and connection with natural objects as to enable the deputy surveyor to adjust the same, according to the instructions hereinabove quoted.

Plaintiff further alleges that, subsequent to the selection of said lands as aforesaid, and pursuant to the application hereinabove recited, a survey of said lands was made under the authority of the surveyor general of Colorado and Utah, as successor in authority to the surveyor general of the Territory of New Mexico, which said survey was commenced on October 22nd, 1863, and was completed on November 4th, 1863, and was by John Pierce, then surveyor general of the Territories of Colorado and Utah, duly approved on the 15th day of March, 1864; that the survey so made and approved shows the ascertainment and location of the initial point described in said application as hereinabove set forth; that the said survey was carried from said initial point eastwardly upon the 38th parallel of latitude, for the distance of two miles, when the further progress of the survey in that direction was interrupted by the following facts as stated by the surveyor:

"The mountain in front of us is utterly impracticable. In our immediate presence is a precipitous wall of granite, and from this point to its crest is a succession of such, only higher and more difficult. I see no way of surmounting the difficulty by offsets or otherwise."

That thereupon the said survey was resumed from the initial point above mentioned, westwardly, along the 38th parallel of north latitude, for a distance of eight miles, to the northwest corner of said location; thence, said survey was continued on a meridian line

southerly a distance of twelve miles, thirty-six chains and forty-four links, to the southwest corner of said location. That said survey was thence continued easterly, upon a line parallel with the
21 38th parallel of north latitude, for a distance of twelve miles, thirty-six chains and forty-four links, to the southeast corner of said location; that thence said survey was continued northerly, upon the east boundary line of said location, for a distance of four miles, seven chains and twelve links, to a point on the east boundary, at which said surveyor set a monument marked "No. 13," and at which point the surveyor making said survey reported as follows:

"From this point to the northeast corner of the grant, the mountains are very rugged, precipitous and deeply covered with snow. The line, if at all, could be carried through only with great difficulty, and with a result with respect to accuracy which could serve but little to any practical purpose."

That, in the survey so made, each of the several corners, to wit, the northwest corner, the southwest corner and the southeast corner of said location, were distinctly marked by monuments, and in the notes of survey were designated by references to natural monuments.

And plaintiff further alleges that the lands claimed by the defendant, and which are involved in the controversy in this action, are situated far within the interior of said location, as hereinabove described, and that the location of the lands claimed by the defendant as aforesaid *are* at a point about four miles south and one and one-half miles east from the initial point of the survey hereinabove mentioned, which said initial point is about four and one-half miles westerly from the northeast corner of said grant.

Plaintiff further alleges that the survey made in the year 1892, referred to in the defendant's said answer herein, was not a location survey for the said grant; that the same was a survey of the north and east boundaries of said Baca Grant No. 4; was based upon the survey of Albinus Z. Sheldon, being the survey hereinbefore described as approved by the surveyor general of the Territory of Colorado, on the 15th day of March, 1864, and that the said survey of 1892 was made for the purpose of designating upon the ground that portion of the north boundary and that portion of the east boundary of said grant not theretofore marked upon the ground, and to so mark and locate the northeast corner of said grant; that said survey did not in any respect whatsoever modify the location of the said Baca Grant No. 4, or the situation of boundaries of the same as designated by the survey of 1863 approved in 1864 as aforesaid; that, in the making of said survey of 1892, which was made under the authority of the Government of the United States, point No. 13 of the survey of 1863, hereinbefore mentioned, was
22 ascertained and identified; that the southeast corner of said grant, as the same was located in accordance with the survey of 1863, was also ascertained and identified, and that the eastern boundary of the said Baca Grant No. 4 was thereupon continued northerly from said point No. 13 by way of completion upon the ground of the boundary lines of said grant as the same was origi-

nally located and as approved in 1864; that, in like manner, in the said survey of 1892, the initial point upon the north boundary, as fixed and determined in the survey of 1863, was found and identified, and from said point said survey was carried easterly along the 38th parallel of latitude, and, as nearly as possible, the said northerly boundary marked and designated by monuments and the northeast corner of said grant established upon the ground. And plaintiff alleges that no change whatsoever was by said survey of 1892 made in any of the corners or lines theretofore established by the said approved survey of 1863. And plaintiff further alleges that the lands claimed by the defendant, and in controversy in this action, are situated about three miles west and four and one-fourth miles north of said point No. 13, on the eastern boundary of the said Baca Grant No. 4.

III.

Plaintiff, for additional and further reply to the allegations contained in the third paragraph of defendant's additional answer, says:

That subsequent to the enactment of the act of June 21st, 1860, confirming to the heirs of Luis Maria Baca certain lands by them thereafter to be selected, and prior to the selection and location of Baca Grant No. 4, described in the complaint, the Commissioner of the General Land Office instructed the surveyor general of the State of Colorado, pursuant to instructions theretofore by him given on or about July 26th, 1860, to the surveyor general of the Territory of New Mexico, as follows:

"The official rendition of the certificate to this office must be accompanied by a statement from yourself and the register and receiver, that the land is vacant and not mineral."

That, after the selection by the heirs of Luis Maria Baca of Baca Grant No. 4, including all of the lands described in plaintiff's complaint, and upon the completion of the survey thereof, John Pierce, surveyor general of the Territories of Colorado and Utah, under date of December 5th, 1863, duly certified that the said Baca Grant No. 4, in the San Luis valley, was upon land which "is not mineral and is vacant."

23 That, at the same time, and under the said date of December 5th, 1863, G. M. Chilcott, register, and C. B. Clements, receiver, of the land office for Colorado Territory, then located at Golden city, in said Territory, also certified that said land upon which said Baca grant was located, "is not mineral and is vacant."

And plaintiff further alleges that, at the time of the selection and location of said lands so constituting Baca Grant No. 4, neither the plaintiff nor his grantors had knowledge that the said lands, or any portion thereof, were mineral lands; that afterwards, and on the 21st day of March, 1879, the Honorable J. A. Williamson, Commissioner of the General Land Office, in an official communication to William L. Campbell, surveyor general of Colorado, in a decision relating to the title to said lands, declared as follows:

"After the selection of this tract, it was surveyed and located by

the surveyor general of Colorado, he having first determined that the land was vacant and non-mineral."

And further decided as follows:

"The conditions and provisions of the act of June 21st, 1860, were * * * that the selection and location should be of land determined at the time of such location when the title passed, to be non-mineral."

The said Commissioner of the General Land Office in said decision, further decided as follows:

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority. The title has passed from the Government and vested in private individuals. * * * The land can no longer be regarded as a part of the public domain."

Wherefore plaintiff alleges that said land has been determined by competent authority, under the laws of the United States, to be non-mineral land, that said determination is conclusive as to all persons claiming under the United States, and that the defendant cannot now claim that the said land, or any part thereof, is mineral land.

And plaintiff asks judgment as in his original complaint prayed.

WOLCOTT & VAILE,
Att'ys for Plaintiff.

STATE OF COLORADO, }
County of Arapahoe, } ss:

Joel F. Vaile, being first duly sworn, deposes and says: That he is the attorney of the above-named plaintiff, and that he
24 makes this affidavit by reason of the absence of the said plaintiff from the district of Colorado; that he has read the foregoing replication and knows the contents thereof, and that the same is true, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

JOEL F. VAILE.

Subscribed and sworn to before me, this 8th day of December, A. D. 1894.

[SEAL.] A. J. TRUSSELL,
Notary Public.

My commission expires Dec. 8th, 1896.

(Indorsed:) 2978. In the U. S. circuit court, district of Colorado. Quincy A. Shaw *v.* Murray M. Kellogg. Additional replication. Filed Dec. 8, 1894. Robert Bailey, clerk U. S. circuit court.

79th day, November term.

WEDNESDAY, *March 13th, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and the Honorable John A. Riner, district judge of the district of Wyoming assigned to the district of Colorado, and other officers as noted on the sixth day of November last past.

And before the Honorable Moses Hallett, district judge, the following proceeding was had:

Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs.
MURRAY M. KELLOGG. } 2978.

At this day comes the plaintiff by J. F. Vaile, Esq., his attorney, and the defendant by J. R. Smith, Esq., his attorney, also comes.

And thereupon comes a jury, to wit:

H. T. Sutherland,	Harrison Montague,
Henry Campbell,	W. H. Morrill,
Frank A. Burnell,	James E. Lightburn,
Charles Davis,	J. T. Jones,
J. N. Pierce,	George B. Berger,
Robert B. Nelson,	Nelson Maine,

twelve good and lawful men; and they are duly selected and tried, empanelled and sworn, to well and truly try the matter at
25 issue herein joined, between the parties to this cause and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court, not to converse among themselves or with others touching this cause, or the matters at issue herein or the evidence heard, or any part thereof, nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

80th day, November term.

THURSDAY, *March 14th, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and Honorable John A. Riner, district judge of the district of Wyoming assigned to the district of Colorado and other officers as noted on the sixth day of November last past.

And before the Honorable Moses Hallett, district judge, the following proceeding was had:

Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs.
MURRY M. KELLOGG. } 2978.

At this day come again the said parties by their attorneys respectively and the said jurors being now all here, present and in the jury-box, the trial herein is resumed.

And the said jurors having heard the evidence produced and the instructions of the court, upon their oaths do say, they find the issues herein joined for the defendant.

82d day.

SATURDAY, *March 16th, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and Honorable John A. Riner, district judge of the district of Wyoming assigned to the district of Colorado, and other officers as noted on the sixth day of November last past.

And before the Honorable Moses Hallett, district judge, the following proceedings were had:

26 Action for possession of specific real property and for damages.

QUINCY A. SHAW
vs. } 2978.
MURRAY M. KELLOGG.

At this day comes the plaintiff by J. F. Vaile, Esq., his attorney: and thereupon it is considered by the court upon the verdict of the jury heretofore entered herein, that the defendant go hence hereof without day and have and recover of and from the plaintiff his costs by him in this behalf laid out and expended to be taxed and have execution therefor.

And day until sixty (60) days from this day is allowed the plaintiff within which time to file a bill of the exceptions reserved by him upon the trial of the issues herein joined.

And the plaintiff also hereby expressly excepts to the verdict and judgment entered herein.

First day, May term.

TUESDAY, *May 7th, A. D.* 1895.

Pleas in the circuit court of the United States for the district of Colorado, at a term thereof begun and held at the United States court-house, at Denver, on the first Tuesday (it being the seventh day) of May, in the year of our Lord one thousand eight hundred and ninety-five.

Present: Honorable Moses Hallett, district judge. Henry V. Johnson, Esquire, district attorney. Joseph A. Israel, Esquire, marshal. Robert Bailey, Esquire, clerk.

Action for possession of specific real property.

QUINCY A. SHAW
vs. } 2978.
MURRY M. KELLOGG.

At this day comes the plaintiff by J. F. Vaile, Esq., his attorney, and moves the court, to vacate the judgment lately had herein and for a new trial of the issues herein.

And it appearing to the court, that the taxed costs herein, have been fully paid and discharged by the plaintiff.

Therefore, it is ordered, that the judgment lately and on the 16th

day of March last past, had herein, be vacated and for naught
27 held and that a new trial of the issues herein joined, be had in pursuance of the statute in such case made and provided.

Twelfth day.

MONDAY, *May 20th, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and other officers as noted on the seventh instant.

Action for possession of specific real property.

QUINCY A. SHAW
vs. } 2978.
MURRY M. KELLOGG.

At this day comes the plaintiff by J. F. Vaile, Esq., his attorney and the defendant by J. R. Smith, Esq., his attorney also comes.

And thereupon comes a jury, to wit:

A. J. Sholes,	Geo. Weetman,
O. G. Crawford,	H. L. Roberts,
David Hodgson,	V. De Vinney,
John Harris	Frank Hannigan,
R. B. Williams,	Hero J. Bourk,
David W. Campbell,	Frank Cornforth,

twelve (12) good and lawful men, and they are duly selected and tried, empanelled and sworn, to well and truly try the matter at issue herein joined and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court, not to converse among themselves or with others touching this cause or the matters at issue herein, or the evidence heard, or any part thereof, nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

28 Thirteenth day.

TUESDAY, *May 21st, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and other officers as noted on the seventh instant.

Action for possession of specific real property.

QUINCY A. SHAW
vs. } 2978.
MURRY M. KELLOGG.

At this day come again the said parties by their attorneys respectively, and the said jurors being now all here, present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court, not to converse among themselves or with others touching this cause, or the matters at issue herein or the evidence heard or any part thereof, nor to listen to such conversation of others are permitted to retire to meet the court at its next incoming.

Fourteenth day, May term.

WEDNESDAY, *May 22d, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and Honorable John A. Riner, district judge of the district of Wyoming, assigned to the district of Colorado, and other officers as noted on the seventh instant.

And before the Honorable Moses Hallett, district judge, the following further proceedings were had:

Action for possession of specific real property.

QUINCY A. SHAW
vs.
MURRAY M. KELLOGG. } 2978.

At this day come again the said parties by their attorneys respectively and the said jurors being now all here present and in the jury-box, the trial herein is resumed.

On motion of the plaintiff, the defendant now here consenting thereto, the allegation as to divers- citizenship in the first paragraph of the complaint is hereby stricken out.

29 And the said (juroes) having heard the evidence on the part of the plaintiff and being thereto by the court instructed, upon their oaths do say, they find the issues herein joined for the defendant.

Wherefore, it is considered by the court, that the defendant go hence hereof without day and have and recover of and from the plaintiff his costs by him in this behalf laid out and expended, to be taxed and have execution therefor.

And day until sixty (60) days from this day is allowed the plaintiff, within which time to file a bill of the exceptions reserved by him upon the trial of the issues herein joined.

Twenty-second day, May term.

SATURDAY, *June 1st, A. D.* 1895.

Present: Honorable Moses Hallett, district judge, and other officers as noted on the seventh ultimo.

Action for possession of specific real property.

QUINCY A. SHAW
vs.
MURRAY M. KELLOGG. } 2978.

At this day comes the plaintiff by J. F. Vaile, Esq., his attorney, and thereupon on his motion, it is ordered by the court, that in the

event, that the plaintiff shall desire to prosecute a writ of error to the United States circuit court of appeals for the eighth circuit, for the purpose of reviewing the decision in this cause, there shall be certified by the clerk of this court direct to the said court of appeals the original exhibits introduced in evidence in this cause numbered and designated as follows, to wit:

No. 15. Photograph of Crestone mountain at the initial corner of Baca Grant No. 4.

No. 16. Photograph of Crestone mountain adjacent to grant.

No. 22½. Official map of the United States accompanying the report of the Secretary of the Interior for the year 1854.

No. 23. Official map of Colorado for the year 1866.

No. 25. Transcript of part of official map of Colorado for the year 1868.

No. 29. Plat prepared by Professor P. H. Van Diest, showing lands adjacent to initial corner.

30 No. 34. Plat of completion survey of northeast corner of Baca Grant No. 4.

No. 35. Manuel of instruction to surveyor general of date February 22nd, 1855.

No. 36. Model and the parts thereof showing profiles of mountains near initial corner.

No. 37. Plat of profiles on natural and exaggerated scale prepared by Mr. Duval.

No. 38. Plat of profiles on exaggerated scale prepared by Mr. Duval.

No. 39. Map of Baca Grant No. 4, showing mountains at northeast corner as determined by the witness Darby.

No. 40. Hayden's geological and topographical map for part of Colorado.

No. 41. Official map of Colorado for the year 1892.

And the said originals be certified to the said court of appeals in lieu of inserting copies thereof in the record.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Bill of Exceptions.

In the Circuit Court.

QUINCY A. SHAW, Plaintiff, }
v. }
MURRAY M. KELLOGG, Defendant. }

Be it remembered that the above-entitled cause coming on for trial before a jury, on the 20th day of May, 1895, the plaintiff, to maintain the issues on his part, introduced the following evidence, to wit:

Act of Congress approved June 21, 1860, and found in 12 U. S. Statutes at Large, pages 71, 72, being as follows:

An act to confirm certain private land claims in the Territory of New Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor general of that Territory, and
31 in his letter to the Commissioner of the General Land Office, of the twelfth of January, eighteen hundred and fifty-eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen and eighteen and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor general as number sixteen, be, and they are hereby, confirmed: Provided, that the claim number nine, in the name of John Scolley and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants.

SEC. 2. And be it further enacted, That in surveying the claim of said John Scolly it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five square leagues claimed by him, and that in surveying the claims of said Cornelio Vigil and Ceran St. Vrain, the location shall be made as follows, namely: the survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square leagues, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the surveyor general of New Mexico immediately to proceed to make surveys and locations authorized and required by the terms of this section.

SEC. 3. And be it further enacted, That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor general in his reports and abstract marked Exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby, confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six, is not confirmed.

SEC. 4. And be it further enacted, That the foregoing confirmation shall only be construed as quitclaims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever.

SEC. 5. And be it further enacted, That it shall or may be lawful for the said Juan B. Vigil or any person claiming title under
32 him, to institute suit against the United States for the lands claimed and embraced in said claim number twenty-six, not

confirmed under the provisions of the third section of this act; said suit to be instituted in the supreme court of the Territory of New Mexico, to be defended by the district attorney of the United States for said Territory, under the direction of the Attorney General of the United States, with the right of appeal to either party from the decision of said supreme court to the Supreme Court of the United States, if such appeal be asked for within one year from the rendition of the judgment in said supreme court of the Territory of New Mexico, and not thereafter: Provided, that if the suit authorized by this section be not instituted within two years from the passage of this act, the said claimants shall be presumed to have abandoned all right or title to the lands embraced in said claim number twenty-six, and said lands shall thenceforth be held and deemed to be public lands belonging to the United States: And provided further, that in the determination of the suit authorized to be instituted by the terms of this section, the courts shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 6. And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

Approved June 21, 1860.

And further to maintain the issues on his part, the plaintiff introduced various letters and documents, marked and numbered as exhibits, which said letters and documents were severally introduced in the order of their numbers, and are here arranged for convenience of reference in chronological order, to wit:

33 EXHIBIT No. 1.

GENERAL LAND OFFICE, *July 26th*, 1860.

To the surveyor general of New Mexico, at Santa Fé, N. M.

SIR: I have to advise you of the appropriation made by Congress for the surveying service in New Mexico for the fiscal year ending 30 June next, which are as follows:

(Here follow certain statements in relation to appropriations, which are here omitted as not material in this cause.)

In advance of the publication of the laws passed by the last Congress, I herewith transmit you a slip of newspaper containing "An act to confirm certain private land claims in the Territory of New

Mexico," approved June 21, 1860, showing what particular private claims were finally confirmed in addition to those confirmed by the act of Dec. 22, 1858. You are directed thoroughly to digest the provisions of the act of Congress, approved June 21, 1860, and to issue the appropriate instructions as to the priority of surveys particularly mentioned in our letter to the surveyor general of New Mexico, under date of April 23rd, 1859, above alluded to, viz:

"It will be your duty first, to survey and separate from the public lands such of the pueblos or individual confirmed claims as now fall within the range of the public surveys, and then you will hereafter proceed in that service by attending to the localities of such confirmed private claims as are nearest to the lines of the public surveys, so that exact and perfect connections therewith shall be kept up, and the immediate connections properly made and closed on the boundaries of the same, when the lines of public surveys advance around them."

In this connection I have to draw your special attention to the 6th section of the said act of June 21, 1860, that section refers to the claim of the heirs-at-law of Luis Maria Baca, which is entered as No. 20 in surveyor general's report, dated Sept. 1, 1859, and the abstract marked Exhibit "A," submitted by the Secretary of the Interior, under date of Feb. 3, 1860, to Congress, and as that land is also claimed by the town of Las Vegas under said No. 20 in the aforesaid report, this law gives the land to the Vegas town claim and allows the Baca heirs to take an equal quantity of vacant land not mineral, in New Mexico, to be located by them in square bodies not exceeding five in number. To give this law timely effect, you will give priority in surveying private claims to this claim,
34 particularly as it is in the vicinity, about 4 miles of the existing lines of the public surveys. You will proceed to have the exteriors of Las Vegas town claim properly run and connected with the lines of the public surveys. The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimants to select a quantity equal to the area of the town tract elsewhere in New Mexico of vacant land, not mineral, in square bodies not exceeding five in number.

You will furnish them with a certificate, transmitting at the same time a duplicate to this office, of their right and the area they are to select in five square parcels. Should they select in square forms according to the existing line of the public surveys, the matter may be properly disposed of by their application duly endorsed and signed with your certificate designating the parts selected by legal divisions or subdivisions, and so selected as to form five separate bodies in square form. Then the certificate thus endorsed is to be noted on the records of the register and receiver at Santa Fé, and sent on here by those officers for approval. Should the Baca claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects in their applications to be filed in your office, as will enable the deputy surveyor when he may reach the vicinity of such selections in the regular progress of the surveys, to have the selections adjusted as

near as may be to the lines of the public surveys, which may hereafter be established in the region of those selections.

In either case the final condition of the certificate to this office, must be accompanied by a statement from yourself and register & receiver that the land is vacant and not mineral.

In reference to other finally confirmed private claims, I deem it unnecessary for me to recapitulate the duties devolved upon the surveyor general under the law, as set forth in the act of June 21, 1860, the provisions thereof being plainly and distinctly drawn up and with abundant details to enable you to carry out the law into effect.

As the appropriation of ten thousand dollars as afor-said contemplates the survey of the public lands as well as private land claims in New Mexico, you will contract for the survey of the former to the extent of $3,000 and for the latter of $6,000 leaving the residue of $1,000 for contingent expenses incident to the surveying service in the field.

The attention of this office having been drawn to the fact that in the vicinity of Fort Stanton, there are several hundred
35 families pursuing pastoral and agricultural avocations, and who are desirous of securing their settlements and improvements under the laws, you are directed to extend east the 2d correction line south in place if practicable, and if not practicable, then *by offsets*, in so *far only*, as to *obviate* the *unsurmountable* obstacles in the way. The extension of said line is to be the distance necessary to afford the basis for the subdivisional survey near Fort Stanton so as to enable you to embrace those settlements within the same, and close the lines of the public surveys on the reserve surveyed under the War Department and ordered by the President on the 12th May, 1859, to be reserved for military purposes. Copy of the plat of that survey was sent to the surveyor general of New Mexico with our letter of the 3d June, 1859. You will please promptly acknowledge the receipt of these instructions.

I am, very respectfully, your ob't servant,

JOS. S. WILSON,
Commissioner.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 17th day of December, 1894.

(EXHIBIT No. 2.)

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *December 8th*, 1860.

Hon. Tomas Cabeza de Baca, legal representative of the heirs of Don Luis Maria Baca, dec'd.

SIR: I hereby certify that the grant to the town of Las Vegas, has been surveyed under instructions from this office, and according to the laws of the United States, and that the acres- of said tract of land is 496,446.96 acres.

Under the act of Congress approved June 21st, 1860, (sec. Statutes at Large, page 71) the heirs of Luis Maria Baca are entitled to select in not more than five square bodies, the amount of land equal to said area, upon any of the unoccupied lands, not mineral, of New Mexico, and the surveyor general is authorized to survey and locate the same; therefore I notify you that this office is ready to
36 co-operate with you, and receive your application, for the location of the lands granted by the Government.

A. P. WILBAR,
Surveyor General of New Mexico.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *December 8th*, 1860.

SIR: Enclosed please find duplicate of the certificate in regard to the Las Vegas grant issued from this office, to the legal representative, of the heirs of Luis Maria Baca.

Yours very respectfully, A. P. WOLBAR,
Surveyor General.

Hon. Jos. S. Wilson, Com'r Gen'l Land Office.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 17th day of April, 1895.

(EXHIBIT No. 3.)

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, *February 9th*, 1863.

SIR: Please find enclosed herewith, the application of the heirs of Luis Maria Baca, to locate one-fifth of the private claim confirmed to them under the act of Congress approved June 21, 1860. This location falls within the Territory of Colorado but within the limits of New Mexico as they existed at the date of the approval of the act confirming this claim.

I have transmitted a copy of the enclosed to the surveyor general of Colorado, to enable him, when required to make the survey.

I am very respectfully, your ob't serv't,

JOHN A. CLARK,
Surveyor General of New Mexico.

Hon. J. M. Edmunds, Com'r of General Land Office, Washington city, D. C.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *February 5th*, 1863.

I, John A. Clark, surveyor general of New Mexico, do hereby certify that, on this day, John S. Watts, Esq., in behalf of the
37 heirs of Luis Maria Cabeza de Baca, filed in this office an application in the words and figures following, viz:

"SANTA FÉ, NEW MEXICO, *December 12th*, 1862.

To Surveyor General John A. Clark, surveyor general of New Mexico:

I John S. Watts, attorney of the heirs of Luis Maria Baca, have this day selected as one of the five locations, belonging to the said heirs, under the 6th section of the act of Congress approved June 21st, 1860, a tract of land in the Territory of New Mexico, described as follows:

Beginning at a point on the eastern edge of the valley of San Luis, where the thirty-eighth parallel of north latitude crosses the base of the snowy range, dividing the waters of the Rivers Arkansas and Del Norte; thence east along said parallel, four and one-half miles; thence south along a meridian line twelve miles, thirty-six (chains) and forty-four links distance; thence west at a right angle twelve miles, thirty-six chains and forty-four links distance; thence north to the said specified parallel of latitude; thence east with said parallel to the place of beginning.

I further state that the said land is entirely vacant, not claimed by any one, is not mineral, but located for purposes of arable and pastoral agriculture, and is within the limits of the Territory of New Mexico as established in the organic act. I hereby accordingly make application for the survey and location of the tract of land in accordance with the provisions of the ab-ve act of Congress.

JOHN S. WATTS,
Attorney for Heirs of Luis Maria Baca."

And I further certify that the said tract of land being the one-fifth part of the private claim confirmed to said heirs, contains ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine hundredths of an acre, and that this location is the fourth of the series, and with the three locations heretofore made numbered one, two & three, includes four-fifths of the said private claim confirmed to the heirs of Luis Maria Cabeza de Baca by the act of Congress approved June 21, 1860.

38 In witness whereof I have hereunto set my name this fifth day of February, A. D. 1863.

JOHN A. CLARK,
Surveyor General of New Mexico.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 17th day of December, 1894.

(EXHIBIT A.)

SURVEYOR GENERAL'S OFFICE,
DENVER, CO. TY., *Feb'y 24th*, 1863.

Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

SIR: I have the honor to report that I have this day received from the surveyor general of New Mexico a copy of the application of the att'y of the heirs of Luis Maria Baca for the location of one

of the five locations belonging to said heirs under the act of June 21st, 1860, dated Dec. 12th, 1862. The description of the tract selected is as follows: "Beginning at a point (?) on the eastern edge of the valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the snowy range dividing the waters of (*the waters of*) the River Arkansas and Del Norte, thence east along said parallel four and one-half miles; thence south along a meridian line twelve miles, thirty-six chains and forty-four links distance; thence west at a right angle twelve miles, thirty-six chains and forty-four links distance; thence north to the said specified parallel of latitude; thence east with said parallel to the place of beginning."

I suppose this selection has been made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca "floats," and should locate it as this is located, for the reason that in his opinion, it would cover rich minerals in the mountains.

Very truly yours ob't serv't,

FRANCIS M. CASE,
Surv. Gen'l Colo. & Utah.

Certified by surveyor general of Colorado, May 18th, 1895.

EXHIBIT "D."

GENERAL LAND OFFICE, *March 13th*, 1863.

Surveyor general, Colorado and Utah, Denver city, Colorado Ty.

SIR: I am in receipt of your communication dated the 24th of February last, reporting that you have received from the
39 surveyor general of New Mexico a copy of the application of the attorney of the heirs of Luis Maria Baca for the location of one-fifth of the private claim confirmed to said heirs—the location being within the limits of New Mexico as they existed at the date of the confirmation, but falling within what is now the Territory of Colorado.

It is necessary before the application can be approved by this office, that it be accompanied by the certificates of the surveyor general and the register & receiver that the land selected *is vacant and not mineral.* This is in accordance with our instructions to the surveyor general of New Mexico, extracts from which were furnished your office in our communication of June 7th, 1862; especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do, you will transmit to this office your official certificate setting forth these facts.

You will also correspond with the register and receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that

your own is to be furnished under, which when received you will forward to this office.

Very respectfully, your ob't serv't,

(Signed) JOS. S. WILSON,
Acting Commissioner.

(EXHIBIT B.)

SURVEY-GENERAL'S OFFICE,
DENVER, C. T., *Oct. 13th*, 1863.

SIR: On the 3d day of October of the present year William Gilpin, as representative of the heirs of Luis Maria Baca, filed in this office an application for the survey of Grant No. 4 of the grants confirmed by the said heirs by act of Congress of June 21st, 1860, a copy of which application is herewith submitted.

Mr. Gilpin further represented that he was desirous of taking immediate possession and improving the said grant, and that to do so it would be necessary to have the survey made during the next six weeks to avoid the deep snow which would render the survey impossible.

40 I informed him that the instructions in this office forbid making the survey of any grant situated more than six miles from existing lines of public surveys, but as his grant was in a part of the country which it would probably be some time before the lines of survey would reach, I would order the survey and make a contract subject to your approval. A copy of my reply to his application is herewith submitted.

As there is as yet no United States depository in operation in this country, Mr. Gilpin deposited the money with me and took my receipt for the same, a copy of which receipt is herewith enclosed. The money is in my hands subject to your order as to the disposition of it, but in case of the non-approval of the contract, the money was to remain in my hands until the survey was finished and to be paid to the deputy for work done, the survey being considered private and not official. This was done in order to secure myself and the deputy, as Mr. Gilpin wished the deputy to take the field immediately.

I transmit herewith the copy of a contract made with Deputy Surveyor A. Z. Sheldon for the survey of the above-mentioned grant, and also my instructions to said deputy. I have acted in this matter as in my judgment seemed best under the circumstances, and hope it will meet your approval.

Very respectfully, your ob't serv't,

JOHN PIERCE,
Surveyor General of Colorado and Utah.

Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

Certified by the surveyor general of Colorado the 18th day of May, 1895.

(EXHIBIT C.)

GENERAL LAND OFFICE, *November 2nd*, 1863.

John Pierce, Esq., surveyor general, Denver, Col. Ter.

SIR: In reply to your communication of the 12th ultimo covering contract instructions and contract with Deputy Surveyor A. Z. Sheldon for the survey of Grant No. 4 of the Baca heirs, I have to say this office cannot approve said contract. In your letter dated the 10th March last transmitting the application of the at-
41 torney of said heirs for the location of this claim, you say, "I suppose this selection has been made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca floats, and should locate it as this is located, for the reason that, in his opinion, *it would cover rich minerals* in the mountains."

Upon receipt of your letter you were expressly informed, under date of the 13th March, 1860, that before the application could be approved it must be accompanied by the certificates of the surveyor general and the register and receiver that the land is *vacant and not mineral*, and I then took occasion to communicate the following explicit instructions: "Especially should the character of the locations as to minerals be carefully ascertained after the important statement of ex-Gov. Gilpin which you communciate in your official letter to this office: Whenever you shall acquire good and satisfactory information that the lands included in the selection are vacant and not mineral, to enable you to do so you will transmit to this office your official certificate setting forth these facts."

In our communication of the 7th June, 1862, you were also furnished with extracts from our instructions to the surveyor general of New Mexico, referring to the location of these claims, in which it was plainly indicated that should selections be made outside of the existing surveys, the survey thereof must be postponed until the vicinity is reached by the regular progress of the public surveys. You will be guided in your official acts by our instructions, which are full and explicit in relation to the location of the claims referred to. The contract and instructions for the survey of the above-mentioned claim are herewith returned.

Very respectfully, your ob't serv't,

J. M. EDMUNDS,
Commissioner.

Certified by the surveyor general of Colorado the 18th day of May, 1895.

EXHIBIT 4.

SURVEY-GENERAL'S OFFICE,
DENVER, C. T., *Dec. 5th*, 1863.

SIR: This is to certify that from good and sufficient evidence I am perfectly satisfied that the land on which the heirs of Luis

Maria Baca have located their Grant No. 4, in the San Luis
42 valley, and marked out by a survey made by Albinus Z. Sheldon, in November, 1863, is not mineral and is vacant.

Very truly, your ob't serv't. JOHN PIERCE,
Surveyor General of Colorado and Utah.

EXHIBIT No. 5.

COLORADO TERRITORY, GOLDEN CITY, *Dec. 5th*, 1863.

SIR: This is to certify that from good and sufficient evidence we are perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out — a survey made by Albinus Z. Sheldon, in November, 1863, is not mineral and is vacant.

G. N. CHILCOTT,
Register Land Office, Colo. Dist.
C. B. CLEMENTS,
Receiver Land Office, Colo. Ty.

Hon. J. M. Edmunds, Comm. Gen'l Land Office, Washington, D. C.

(EXHIBIT E.)

SURVEYOR GENERAL'S OFFICE,
DENVER, C. T., *Dec. 12th*, 1863.

SIR: I have the honor to acknowledge the receipt of your letter of the 2nd of Nov. last disapproving of the contract for the survey of Grant No. 4 of the floats belonging to the heirs of Luis Maria Baca.

I herewith transmit my certificate that the lands are "not mineral and are vacant." You refer to a letter of the former surv. gen'l of this district, in which he says that he supposes that this location was made by Mr. Gilpin "for the reason that in his opinion it would cover rich mineral lands." I do not believe that at the time Mr. Case wrote that letter he had the least idea that the float as located covered any mineral lands. I have signed the accompanying certificate partly from my own knowledge of the country, but mostly for the following reasons:

1st. The discoveries of gold thus far go to show that the gold lands of Colorado commence at the base of Long's peak and extend
43 in a course about 30° west of south to the head-waters of the San Juan covering a belt of country, about 30 miles in width of which the line indicated will be near the western boundary: outside of this no gold or silver lodes have been discovered.

2nd. The grant is located on the great line of travel between Denver and Santa Fé, and thousands of experienced miners have been travelling of the Sangre de Christo and Mosca passes and have found no gold or other valuable minerals.

3rd. In the summer of 1860 a party of one hundred and fifty miners from here under one Roeder went to the San Luis valley and prospected the whole of the Sangre de Christo range, but found

no gold anywhere on the eastern run of the park. Many of the men who were in this expedition have been in my employ, and from them I have had this history of the expedition.

Such are the grounds on which I have signed the certificate, and to me they are satisfactory.

The survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessable at any time of the year.

I have refunded to Mr. Gilpin the money placed in my hands, and he has paid for the survey as a private survey, though he has permitted me to make an abstract of the field-notes, which I have placed on file in this office.

Your letter of Nov. 16th granting me a leave of absence is also received. The cold weather has so protracted the surveys that I cannot avail myself of it, though it is possible I may wish to visit the States some time during the winter or spring.

Very truly, your ob't serv't, JOHN PIERCE,
Surv. Gen'l of Colorado & Utah.

Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

Certified by the surveyor general of Colorado the 18th day of May, 1895.

(EXHIBIT F.)

GENERAL LAND OFFICE, *January 16th*, 1864.

John Pierce, Esq., surveyor general, Denver city, C. T.

SIR: Your letter of the 14th Dec. last with inclosed certificate relating to the 4th location of the Baca heirs is received.

44 The act of 21st June, 1860, confirming the claim of Luis Maria Baca, authorized the heirs of said Baca to select in lieu of the tract claimed by the town of Las Vegas, an equal quantity of *vacant* land *not mineral*. With a view to carry out the requirements of the law, the surveyor general of Colorado was required in our instructions of June 7th, 1862, to accompany the final rendition of the certificate with his own statement, and also that of the register and receiver setting forth the fact that the land selected is vacant and not mineral. Those instructions were reiterated in our letter of March 13th, 1863.

The evidence furnished by you is not sufficient in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral deposits. Your certificate is not based upon actual knowledge of the facts, but upon the information and conclusions deduced from reasoning. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of ex-Governor Gilpin officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.

The statement of the register and receiver required in our instructions is also wanting.

The approval of the selection will stand suspended until some satisfactory proof is obtained upon the points indicated.

Very respectfully, your ob't serv't,

J. M. EDMUNDS,
Commissioner.

Certified by the surveyor general of Colorado the 18th day of May, 1895.

(EXHIBIT No. 18.)

GENERAL LAND OFFICE, *February* 12, 1864.

John Pierce, Esq., surveyor general, Denver city, Colo.

SIR: I have considered your report of the 14th December last respecting the survey made in November, 1863, by Deputy Surveyor Albinus Z. Sheldon, of what is known as the Luis Maria Baca float in San Luis park in Colorado and containing 92,293 acres.

45 (You*r*) transmit your certificate "that the lands are not mineral and are vacant," and state under specific heads "the grounds on which" you "have signed the certificate" and which are satisfactory to you. You report further that "the survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessible at any time of the year."

The act of Congress approved 21st June 1860, U. S. Statutes at Large, vol. 12, page 71, chap. 167, confers authority for the location of the said Baca float in the then Territory of New Mexico, but now a part of Colorado Territory.

The said statute makes it the "duty of the surveyor general of New Mexico" now in your jurisdiction "to make survey and location of the lands so selected by the heirs of Baca when thereunto required by them" with a proviso making a three years' limitation to the statute.

You*r* further report that you have refunded to Mr. Gilpin the money placed in your "hands and he has paid for the survey as a private survey, though he has permitted" you "to make an abstract of the field-notes which" you "have placed on file in" the surveyor general's office.

This part of the proceedings is irregular. Under statutory requirements it is obligatory upon private claimants to pay for the survey of confirmed private claims, but the work must be done under the usual obligations and responsibilities both of deputies & surveyor general.

The difficulty, however, may be avoided by pursuing the following course: The original field-notes, duly verified and authenticated, must be filed in the surveyor general's office of Colorado upon bringing these to the usual satisfactory tests, and finding the same all regular and correct you are authorized, in virtue of the aforesaid 6th section of the said act of 21st June, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute—but not to embrace mineral land, nor to interfere with any other vested rights if such exist.

The statute does not order the issue of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will therefore constitute the evidence of title.

You will take care so to arrange the matter that hereafter when in the gradual progress of the lines of the public surveys, they
46 shall reach the Baca location they shall be properly connected therewith and so appear on the township plats.

Very respectfully, your ob't serv't,

J. M. EDMUNDS,
Commissioner.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 27th day of April, 1894.

EXHIBIT No. 17.

GENERAL LAND OFFICE, *Feb'y 26th*, 1864.

John Pearce, Esq., surveyor general, Denver city, Colorado T.

SIR: At the request of Wm. Gilpin, Esq., I herewith transmit the following papers, to wit:

First. Mr. Gilpin's application for the survey of Grant No. 4 of the heirs of Baca, dated Oct. 3rd, 1863.

Second. Surveyor general's estimate of the cost of said survey, dated Oct. 5th, 1863.

Third. Surveyor general's receipt for $600, deposited by Mr. Gilpin to pay for the above survey, October 6th, 1863.

Fourth. Certificate of the register and receiver at Golden City, Colorado, that the lands covered by the said Grant No. 4 are not mineral and are vacant, December 5th, 1863.

Fifth. The field-notes of the boundary lines of the above grant, together with plat thereof.

These papers were deposited in this office by Mr. Gilpin and are transmitted to you for such action as you shall deem proper in the premises in accordance with the views expressed in our communication to you, dated the 12th instant.

Very respectfully your obedient servant,

J. N. EDMUNDS,
Commissioner.

EXHIBIT No. 6.

Boundary of Grant No. 4.

Field-notes of the survey of Grant No. 4, in the San Luis valley, Colorado Territory, by Albinus Z. Sheldon, deputy surveyor,
47 under his contract bearing date the 7th day of October, 1863.

Survey commenced October 22nd and concluded November 4th, 1863 *4th, 1863.*

List of Names.

A list of the names of the individual employed to assist in running, measuring or marking the lines and corners described in the following field-notes of Grant No. 4, showing the respective capacities in which they acted.

Robert Finley, Milton Hadley, chainmen.
James H. Woodworth, mound-builder.
James H. Woodworth was sworn in as flagman, but in consequence of being short a hand, when we arrived in the field he was employed as mound-builder.

Camp near a log cabin on the left bank of La Riviere Trois Tetons. By observation of the sun at meridian my instrument gives us a latitude of 38° 01′ 15″ N. By an observation of the polar star at 11 o'clock p. m. my instrument gives for our latitude 37° 57′ 47″ north.

Difference between solar and stellar observations 3′ 28″.

OCTOBER 22ND, 1863.

Repeat observations of the meridian passage of the sun.
Result 38° 01′ 21″ north latitude.
Make observation of the polar star and obtain for our latitude 37° 57′ 53″ N.
Difference between solar and stellar observations 3′ 28″.

OCTOBER 23RD.

I again make observation of the sun's meridian passage and obtain for our latitude 38° 01′ 18″ north. The sky becoming obscured by clouds I am prevented from repeating my observations of the polar star.

The mean of my solar observations is..... 38° 01′ 18″
The mean of my stellar observations is..... 37° 57′ 50″
And the mean of these results is..... 37° 59′ 34″

48 I therefore find that I am 26″ or 40 chains south of the 38th parallel of latitude north.

OCTOBER 24TH.

Commencing at the point where the observations hereinbefore mentioned noted were made, I run north on a random line 40 chains to the 38th parallel north latitude; thence east along said parallel 240.00 chains, the variation being respectively for the 1st, 2nd and 3rd miles 15° 00′ east; 15° 16′ east; 15° 16′ east to the base of the range which divides the waters of the Arkansas and Del Norte rivers and establish the initial point of the survey. Set a granite stone 18 inches long, 12 inches wide and 8 inches thick marked "I. C." for the initial corner.

Chains. East on the northern boundary of Grant No. 4, variation 15° 00′ east.

40.00 Set a blue granite stone 18 inches long, 16 inches wide and 8 inches thick, marked "½" for half-mile corner.

49.50 To La Riviere "Trois Tetons," 10 links wide, flows S. 60° W.

60.80 Enter La Riviere "Trois Tetons," flows N. W.

62.50 Leave La Riviere "Trois Tetons," flows west.

80.00 Set granite stone 24 inches long, 12 inches wide and 6 inches thick, marked No. 1, for the first mile monument.

Land mountainous and rocky. Timber pinion, cedar, aspen, pine and fir.

East on the second mile, north boundary of Grant No. 4. Variation 15° 00′ east.

38.50 Summit of ridge 3,000 feet above the plain bears N. E. and S. W.

40.00 Set a blue-granite stone 18 inches long, 12 inches wide and 6 inches thick, marked "½" for half-mile monument.

46.00 Descend ridge.

OCTOBER 26TH.

52.25 Enter northwest side of small grassy park, containing about 100 acres, bears N. E. and S. W.

52.50 Offset south 7.00 chains, from which a point of the peak in front, intersected by boundary line bears N. 87° E. Angle of elevation 18°.

53.00 Spring branch 111 links wide, flows S. W.

71.00 Leave park and enter aspen and fir timber, bears N. and S.

49

78.00 Leave bottom appertaining to the park and ascend steep rocky mountain, bears N. W. and S. W.

80.00 N. W. corner of a granite rock 10 feet long, 8 feet wide and 4 feet thick, which we mark No. 2 for the second mile monument. Land west 52.25 chains and east 2.00 chains, rocky and mountainous, remainder low and marshy. Timber, fir, aspen, pine and spruce. The mountain in front of us is utterly impracticable. In our immediate presence is a precipitous wall of granite; and from this point to its crest there is a succession of such, only higher and more difficult. I see no way of surmounting the difficulty by offsets or otherwise and therefore am compelled to abandon the survey at this point.

Chains. Returning to the initial monument I run west along the 38th parallel of north latitude. Variation 15° 06′ east.

2.80 Cedar 30 inches in diameter.

40.00 Set a granite rock 17 inches long, 14 inches wide and 9 inches thick, marked "½" for half-mile monument.

80.00 Set a blue sandstone 20 inches long, 14 inches wide, and 3 inches thick, marked "No. 49" for the (fort*h*)-ninth mile monument.

Land descending to the S. W. 3rd rate. Timber pinon and pine.

West on the forty-ninth mile. Variation 15° 16′ east.

6.00 Leave pinion timber and enter pra-rie, bears N. and S.

28.00 Leave upland and enter bottom, bears N. and S.

30.00 Enter scattering timber, bears N. E. and S. W.

40.00 Drive charred stake and set post in mound with trench as per instructions for ½-mile boundary mark.

54.50 Enter undergrowth, bears N. E. and S. W.

55.45 North branch of La Riviere "Trois Tetons" (dry) 10 links wide, bears N. E. and S. W.

56.50 The same, bears N. W.

59.00 The same, bears S. W.

63.00 Leave scattering timber and undergrowth and enter prairie, bears N. E. and S. W.

80.00 Drive charred stake and set post in mound with trench as per instructions, for the forty-eighth-mile boundary mark.

50

Land east 28.00 chains gradually descending to the west remainder level bottom soil 1st rate. Timber, pinion and cottonwood; undergrowth, willow and alder.

Chains. West on the (fort*h*) eight-mile. Variation 15° 00′ east.

40.00 Drive charred stake and set post in mound with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for the forty-seventh boundary mark.

Land level. 2nd rate.

OCT. 27TH.

West on the forty-seventh mile. Variation 14° 57′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for forty-sixth-mile boundary mark.

Land level and sandy. 2nd rate.

OCT. 28TH.

West on the forty-sixth mile. Variation 14° 48′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of forty-fifth mile.

Land east ½ mile, level. West half mile gently rolling. Soil 2nd rate.

Chains. West on the forty-fifth mile. Variation 14° 30′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of forty-fourth mile. Land level; soil sandy loam, and abounding in greasewood, gramma grass and cactus.
West on the forty-fourth mile. Variation 14° 13′ east.

51

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of forty-third mile.
Land level; abounding in artemisia; soil good; 2nd rate.
West on the forty-third mile. Variation 13° 48′ east.

40.00 Drive charred stake and set post in mound, with trench as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of the forty-second mile and northwest corner of Grant No. 4.
Mark post "N. W. cor. Grant No. 4."
Land level, abounding in artemisia. Soil good. 2nd rate.
Pinion point on the west side of the valley bears west.
Point of bluff where the Del Norte debouches into the valley bears S. 55° 32′ west.

Chains. From this corner I run south on the west boundary of Grant No. 4 and the forty-second mile.
Variation 13° 43′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, *with trench*, for boundary mark of forty-first mile.
Land level; good soil and covered with artemisia.
South on the forty-first mile; west boundary.
Variation 13° 43′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of fortieth mile.
Land part of a wide savannah formed by the absorption of La Riviere "Trois Tetons," extending westward beyond the view, and densely covered with grass. Portions of it in high water, subject to overflow. Soil rich.

52

South on the fortieth mile, west boundary.
Variation 13° 23′ east.

28.80 Dry bed of "Trois Tetons" creek, 10 links wide, bears S. W.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

Chains.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-ninth mile.

Land level bottom; soil 1st rate; heavy growth of grass.

South on the thirty-ninth mile, W. boundary.

Variation 14° 02′ east.

11.50 Variation 13° 33′ east.

36.00 Variation 13° 18′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-eighth mile.

Land level and 1st rate; south ½ mile yielding artemisia.

OCT. 28TH.

South on the thirty-eighth mile, W. boundary.

Variation 13° 14′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

40.25 Variation 13° 26′ east.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-seventh mile.

Land, uneven bottom. 1st-rate soil.

Chains.

South on the thirty-seventh mile, W. boundary.

Variation 13° 26′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench as per instructions, for boundary mark of thirty-sixth mile.

53

Land, uneven bottom interspersed with sink-holes.

Soil 1st rate.

South on the thirty-sixth mile, west boundary

Variation 13° 33′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for mile boundary mark of thirty-fifth mile.

Land, uneven bottom; good 2nd rate.

South on the thirty-fifth mile, west boundary.

Variation 13° 41′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-fourth mile.

Land, uneven bottom. Soil, good 2nd rate.

Chains.

South on the thirty-fourth mile, west boundary.
Variation 13° 36′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-third mile.

Land, uneven bottom. Soil, good 2nd rate.
South on the thirty-third mile, W. boundary.
Variation 13° 36′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of the thirty-second mile W.

Land, level bottom. Soil, 1st rate.
South on the thirty-second mile, west boundary.
Variation 13° 45′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirty-first mile.

Land, level bottom. Soil 1st rate.

54

Chains.

South on the thirty-first mile, west boundary. Variation, 13° 45′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of thirtieth mile. This mile, with the last two miles and the ½ mile succeeding, is part of extensive savan-ah formed by the Chatillon creek.

South on the thirtieth mile, west boundary.
Variation 13° 45′ east.

36.44 Drive charred stake and set post marked "S. W. corner Grant No. 4," in mound, with trench, as per instructions, for S. W. corner of the grant. From this corner pinion point bears N. 60° 47′ west: bluff on Del Norte S. 81° 27′ west: mesa in the park, on the right bank of the Del Norte (west end) south: same mesa (east end) bears S. 2° 57′ E. north peak of the Sierra Blanca, S. 53° 42′ E. From this corner, I run on the thirtieth mile east, on the south boundary of Grant No. 4. Variation 13° 45′ east.

40.00 Drive stake charred, &c.
76.00 Enter bullrushes, bear N. and S.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of twenty-ninth mile.
Land, level bottom. Soil, 1st rate.

Chains.
East on the twenty-ninth mile, south boundary.
Variation 13° 45′ east.
3.50 Leave bullrushes; bears N. E. and S. W.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary of twenty-eighth mile.
Land level. Soil, 1st rate.
East abounding in artemisia.

OCTOBER 31ST.

East on the twenty-eighth mile, south boundary.
Variation, 13° 45′ east.
55
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of twenty-seventh mile.
Land level. Soil, sandy; 1st rate.
East on the twenty-seventh mile, south boundary.
Variation 14° 08′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark twenty-sixth mile.
Land, gently rolling. Soil, sandy. 2nd rate.
Growth, artemisia and gramma grass.

Chains.
East on the twenty-sixth mile, south boundary.
Variation, 14° 08′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions for boundary mark of twenty-fifth mile. Land, gently rolling, sandy, and abounds in artemisia and sage bush. 2nd rate.
East on the twenty-fifth mile, south boundary.
Variation, 14° 08′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of the twenty-fourth mile.
Land, gently rolling, sandy, and abounding in artemisia; 2nd rate.
East on the twenty-fourth mile, south boundary.
Variation, 14° 24′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of twenty-third mile.
Land rolling, sandy, and abounding in artemisia.
Soil, 2nd rate.

56

Chains.

East on the twenty-third mile, south boundary.
Variation, 14° 33′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench as per instructions, for boundary mark of twenty-second mile.
Land, rolling, sandy and abounding in artemisia.
Soil, 2nd rate.

NOV. 1ST, 1863.

East on the twenty-second mile, south boundary.
Variation, 14° 39′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of twenty-first mile.
Land rolling, sandy and abounding in artemisia.
Soil, 2nd rate.
East on the twenty-first mile, south boundary.
Variation, 14° 48′ east.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of twentieth mile.
Land, rolling and sandy. Soil 2nd rate.

Chains.

East on the twentieth mile, south boundary.
Variation, 14° 57′ east.
17.00 Enter barren sand hills, formed by the wind: bear N. E. and S. W.
27.00 Enter dry bed of the Rio Arenas 450 links wide; bears south.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of nineteenth mile.

Land, barren sand hills, worthless.

57

East on the nineteenth mile, south boundary.

Variation, 15° 00′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of eighteenth mile.

Land, barren sand hills.

East on the eighteenth mile, south boundary.

Variation, 15° 03′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

72.88 Drive charred stake and set post in mound, with trench, as per instructions, for "S. E. corner of Grant No. 4." This post is marked, "S. E. corner of Grant No. 4."

Chains. The mesa in the park, on the right bank of the Del Norte, (west end), bears S. 16° 55′ W. Same mesa (east end), bears S. 13° 32′ W. North peak of the Sierra Blanca bears S. 18° 30′ E.

The south boundary line, if produced east, will intersect the mountains near the Mosca pass, about eight miles distant. I shall not obtain a sufficient base on the east boundary line, to triangulate it. From this corner, I run continuing the eighteenth mile north on the east boundary of Grant No. 4.

Variation, 14° 26′ east.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of the seventeenth mile.

Sand hills, some of which are 1,000 feet high.

North on the seventeenth mile, east boundary.

Variation, 14° 42′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary of sixteenth mile.

Land, barren sand hills.

58

Chains. North on the sixteenth mile, east boundary.

Variation, 15° 00′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.

42.50 Leave sand hills and enter bottom of the Rio Arenas, bears E. and W.

43.00 Enter timber, bears E. and W.
48.30 Rio Arenas, 25 links wide, flows west.
52.50 Leave bottom and enter rolling land, bears E. and W.
53.00 Leave timber, bears E. and W.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of the fifteenth mile.

Land, south 42.50 chains, barren sand hills; remainder rolling and sandy. 3rd rate. Timber, cottonwood, cedar and alder.

NOVEMBER 3RD, 1863.

North on the fifteenth mile, east boundary.
Variation, 15° 00′ east.

40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
80.00 Drive charred stake and set post in mound, with trench, as per instructions, for boundary mark of fourteenth mile.

Land, rolling and sandy. 3rd rate. Growth, artemisia.

Chains. North on the fourteenth mile, east boundary.
Variation, 15° 00′ east.
10.00 Enter pine and pinon timber, bears E. and W.
40.00 Drive charred stake and set post in mound, with trench, as per instructions, for ½-mile boundary mark.
44.00 Variation, 15° 15′ east.
65.00 Ascend steep mountain, bears N. W. and S. E.
75.00 Summit of ridge, 1,000 feet above the plain, bears E. and W.
80.00 Set a blue granite stone in a gulch: stone 14 inches long, 12 inches wide, and 6 inches thick, marked No. 13 for boundary monument of the thirteenth mile.

Land south ½ mile, hilly and sandy, the entire mile, declining rapidly to the south and west; soil worthless.

59

Timber, pinon, pine, cedar and aspen.

From this point to the N. E. corner of the grant the mountains are very rugged, precipitous and deeply covered with snow. The line, if at all, could be carried through only with great difficulty and with a result, with respect to accuracy, which could serve but little to any practicable purpose. I therefore deem it advisable, as indeed it seems compulsory, to abandon the line at this point.

NOVEMBER 4TH, 1863.

Note.

In the observations for latitude the seconds were obtained by observing, with an eye-glass, the spaces intercepted between the graduated points of the instrument, the actual graduation being only to minutes. These observations were made with great care and approximate the true reading very nearly.

The stakes are numbered as they should have been had the survey been continued from the initial point to the N. E. corner, and so on, with this exception: Notwithstanding the chaining was carefully made on the mountain line running east two miles from the initial corner, I was convinced that we were constantly losing in our measurement. I therefore, in order to facilitate our closing deemed it advisable to run eight full miles from the initial corner west before setting the northwest corner.

General Description.

This grant contains every grade of land from the most productive to the most sterile. La "Trois Tetons" and the Chatillon creeks have each rich bottom lands, from one-half of a mile to a mile in width, extending nearly to the mountains. About six miles from the mountains the bottoms rapidly widen until along the west boundary they become almost an unbroken savannah thickly covered with grass, red-top and other varieties, some of which is five feet in height.

The grant contains about forty thousand (40,000) acres which may be classed as 1st rate. The balance, excepting the sand hills in the southeast corner (about six square miles) and the extreme mountain portion (say ten square miles) is good grazing land; and between the Chatillon and Arenas creeks affords a rich growth of gramma grass.

The Chatillon leaves the mountains at a point nearly equidistant between the north and south boundary lines, and runs in a due westerly direction until it is lost in the savannah above mentioned. These creeks are timbered about five miles. There is considerable good pine near the base of the mountains, and firs higher up. Along the streams are cottonwoods (sweet cottonwoods) of considerable size. There is no stone except in the vicinity of the mountains. These are composed mainly of a dense and fine-grained granite varying to sienite and gneiss. Near their base is found a very compact conglomerate, parti-colored and presenting more than the beauties of the mosaic art. Saw fragments of limestone (jurassic) but none in position. Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle set forth in the notes.

The general course of the mountains, from the Mosca pass is N. 32° W. and in the vicinity of the "Trois Tetons" and the Chatillon creeks, their elevation above the park is 6,300 feet.

List of Names.

A list of the names of the individuals employed to assist in running, measuring, and marking the lines and courses described in the foregoing field-notes of Grant No. 4 of the heirs of Luis Maria Baca, in the San Luis valley, Colorado Territory, showing the respective capacities in which they acted.

Robert Finley, chainman.
Milton Hadley, chainman.
James H. Woodworth, mound-builder.

We hereby certify that we assisted Albinus Z. Sheldon, deputy surveyor, in surveying the exterior boundaries of Grant No. 4 of the heirs of Luis Maria Baca, in the San Luis valley, Colorado Territory, and that said grant has been in all respects, to the best of their knowledge and belief, well and faithfully surveyed, and the boundary monuments planted according to the instructions furnished by the surveyor general.

ROBERT FINLEY, *Chainman.*
MILTON HADLEY.

Sworn to and subscribed before me this 28th day of November, A. D. 1863.

M. G. BRADFORD,
Clerk of Dist. Court, 2nd Judicial Dist.,
P'r GEORGE A. BUTE, *Dep-ty.*
JAMES H. WOODWORTH.

Sworn to and subscribed before me this 30th day of November, A. D. 1863.

M. G. BRADFORD,
P'r GEORGE A. BUTE, *Dep-ty.*

61 & 62 I, Albinus Z. Sheldon, deputy surveyor, do solemnly swear that, in pursuance of a contract with John Pearce, surveyor of the public lands of the United States, in the Territories of Colorado and Utah, bearing date the 7th day of October, A. D. 1863, and in strict conformity with the laws of the United States and the instructions furnished by the surveyor general, I have faithfully surveyed the exterior boundaries of Grant No. 4 of the heirs of Luis Maria Baca, in the San Luis valley, Colorado Territory, and do further solemnly swear that the foregoing are the true and original field-notes of said survey.

A. Z. SHELDON,
Deputy Surveyor.

Sworn to and subscribed before me, this twenty-eighth day of November, A. D. 1863.

M. G. BRADFORD,
Clerk of Dist. Court, 3rd Judicial Dist.,
P'r GEORGE A. BUTE, *Deputy.*

SURVEYOR GENERAL'S OFFICE,
DENVER, C. T., *March 15th*, 1864.

The foregoing field-notes of the survey of Grant No. 4, heirs of Luis Maria Baca, executed by Albinus Z. Sheldon, under his contract of the 7th day of October, 1863, having been critically examined, the necessary corrections and explanations made, the said field-notes and the survey they describe are hereby approved.

JOHN PIERCE,
Surveyor General of Colorado and Utah.

To the foregoing field-notes, and as a part of said Exhibit 6, was attached a certificate as follows, to wit:

GENERAL LAND OFFICE, *May 6th*, 1868.

I, Joseph S. Wilson, Commissioner of the General Land Office, do hereby certify that the annexed are true and literal exemplifications from the records of this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] JOS. S. WILSON,
Commissioner of the General Land Office.

(Here follows diagram marked p. 63.)

64 & 65 EXHIBIT No. 19.

SURVEYOR GENERAL'S OFFICE,
DENVER, C. T., *March 29th*, 1864.

SIR: I have the honor to acknowledge the receipt of your letter of Feb'y 26th, enclosing field-notes and papers in regard to the survey of Grant No. 4 of the heirs of Luis Maria Baca.

I herewith enclose transcript of field-notes & plat of said survey. I have furnished ex-Gov. Gilpin with one copy of the plat and retained one in the office.

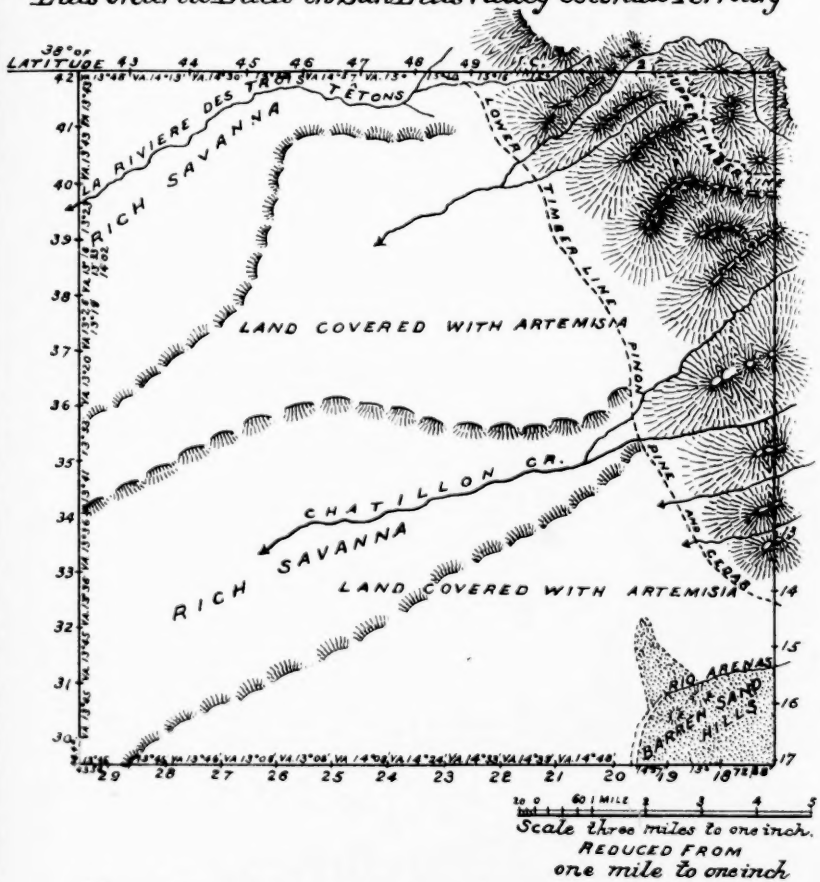
Very respectfully, your ob't serv't,

(Signed) JOHN PIERCE,
Surveyor General of Colorado & Utah.

Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

Ex. Nº 7.

MAP OF THE **SURVEY** OF **GRANT Nº4** OF THE HEIRS OF
Luis Maria Baca in San Luis Valley Colorado Territory



The above map of the boundary lines of Grant No. 4 of the heirs of Luis Maria Baca in San Luis Valley Colorado Territory, as surveyed by Albinus Z. Sheldon under his contract bearing date the 7th day of October 1863, is strictly conformable to the field notes on file in this office, which have been examined and approved, subject to the conditions and provisions of Sec. 6 of the act of Congress approved June 21st 1860.

Surveyor Generals Office JOHN PIERCE
Denver March 18th 1864 Sur. Genl. Colo. & Utah

No 157 By Quincy C. Shaw and Murray M. Kellogg } A 63

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EXHIBIT No. 20.

GENERAL LAND OFFICE, *May 4th*, 1864.

John Pierce, Esq., surveyor general, Denver city, C. T.

SIR: Your letter of March 29th last, transmitting transcript & field-notes of the survey of Grant No. 4, of the heirs of Luis Maria Baca, has been received at this office.

Very respectfully, your ob't serv't,

(Signed) J. M. EDMUNDS,
Commissioner.

EXHIBIT No. 8.

Heirs of Luis Maria Baca
to
Tomas Cabeza de Baca.

Know all men by these, that we the undersigned heirs-at-law and legal representatives of Don Luis Maria Baca, deceased, have made, constituted and appointed, and do by these presents make, constitute and appoint, Don Tomas Cabeza de Baca of Pena Blanco, Santa Anna county, New Mexico, our true and lawful attorney for us and in our name to prosecute, attend to, and manage all
66 matters of business, relating to the interests of said heirs of Luis Maria Baca, to employ and pay (attorn*i*es) in such manner as may seem best, and we further authorize and empower our said attorney to make and execute, in our name, and for us, as our attorney-in-fact, a deed to John S. Watts, his heirs and assigns, for the lands granted to the said heirs of Luis Maria Baca under the 6th section of an act of Congress approved the 21" of June, 1860, described in locations No. 2, 3, 4, and upon the payment by said John S. Watts to the said Tomas Cabeza de Baca of the sum of five thousand dollars, we also authorize and empower him to make and execute a deed to said John S. Watts, his heirs or assigns for the lands described in location No. 5 on the Pecos river, or such other lands as may hereafter be located upon, in the place of said lands, should said location be ( ) after in conveyance of the same being included within the Apache and Navajo reservation, and we hereby ratify and confirm whatever contract, agreement or title the said Tomas Cabeza de Baca has or may make or execute in the premises and upon the confirmation of the grant made to Luis Maria Baca in favor of his heirs by Congress to the place called Ojo Esperete Lanto we also authorize and empower our said attorney to make and execute to John S. Watts, his heirs or assigns, a deed to his portion of said grant and the remaining portion to divide or sell and convey as may seem most conducive to the interest of said heirs of Luis Maria Baca and in our name as our attorney-in-fact, to execute any and all documents, papers and letters, necessary in the premises, and we hereby ratify and confirm whatever our said

attorney may do in the premises as fully as if done by us in our own proper persons.

Witness our hands and seals this 1st day of May, 1864.

DIEGO BACA. [SEAL.]
LUIS BACA. [SEAL.]
DOMINGO BACA. [SEAL.]
JESUS M. BACA, [SEAL.]

Purchaser of the Interest of Jesus Baca y Lusero 2°.

PRUDENCIA BACA. [SEAL.]
FELIPO BACA. [SEL-O.]
LUIS SELA ESPOSE SA JOSEFA BACA. [SEL-O.]
FOREPA BACA Y S^{a} HY. [SELLO.]
ME. ALLAVEACIA BACA. [SELLO.]
Por Rosa Baca y TOREPA SALAS. [SELLO.]
seis braderos por LUIS MA. BACA. [SELLO.]
Maces Baca. ALFONSO BACA. [SELLO.]
JESUS DE DIOS BACA. [SELLO.]
67 MARTIN BACA. [SELLO.]
JESUS BACA Y LUCERO 1ST. [SELLO.]
Por Jose Baca y Less CREDEROS JESUS BACA GALLEGOS. [SELLO.]
Por Juan Anto. Baca y sus CREDOES TOMAS C. DE BACA. [SELLO.]
ANTO. BACA,
Por LUVRA PAULE ANT^{o} GARCIA. [SELLO.]
FRAN. GARCIA. [SELLO.]
JESUS GARCIA. [SELLO.]
JUANO GARCIA. [SELLO.]
Por GUADULUPE BACA Y CREDEROS. [SELLO.]
ANTO. TRUJELLO. [SELLO.]

(Here follow certificates of acknowledgement and of record.)

EXHIBIT No. 9.

Luis Baca *et al.*
to
John S. Watts.

Know all men by these presents, that we Luis Baca, Prudencia Baca, Jesus Baca and Domingo, sons of Luis Maria Baca, residents of Pena Blanca, New Mexico, that we Josefa Baca y Lucero, wife of Luis de Luo and Altagracia Baca wife of Francisco Martinea, daughters of Luis Maria Baca, residents of Pena Blanca, New Mexico, in our own proper persons, and we either in our own persons or by our attorney-in-fact Tomas Baca, to wit, Jesus Baca, Tomas Baca, Encarnacion Baca wife of Manuel Viscario, Josefa Baca wife of Demetio de Lao, Jose Baca, Tomas Baca 2°, Trinidad Baca, wife of Fernando Delgado, Altragracia Baca wife of Patricio Silva, children of Juan Antonio Baca deceased, son of Luis Maria Baca, we Francisco Silva, Nabel Silva, wife of Vicente Armijo, Jesus Maria Silva,

Benito Silva, Valentin Silva and Manuel Silva, children of Cecaria Baca deceased, who was a daughter of Juan Antonio Baca deceased, we Isabel Baca wife of Jose Doroteo Sena, Daria Baca, Santiago Baca, Maria Baca, wife of Luis Maria Ortez, and Adelide Baca children of Domingo Baca deceased, son of Juan Antonio Baca, we Antonio Baca, Felipe Baca, wife of Jose Baca, Jesus Maria Baca, Fernando Baca, Josefa Baca, wife of Jesus Baca, Polonia Baca wife of Pedro Archilegne and Francisco Baca, children of Jose Baca de-
68 ceased, son of Luis Maria Baca, we Querino Baca, Diego Baca, Guadalupe Baca wife of Jesus Maria Leiba, Romaldo Baca, Martina Baca, and Paulina Baca, children of Miguel Baca deceased, son of Luis Maria Baca, we Luis Maria Baca, Alejandro Baca, Juan de Dios Baca and Martino Baca, children of Matio Baca deceased, we Antonio Trujillo, Maria Josefa Trujillo, wife of Cesario Ramirez, Andres Trujillo, Juan Trujello, children of Guadalupe Baca, daughter of Luis Maria Baca and wife of Santiago Trujillo, and we, Josefa Lopez wife of Nicolas Armijo and daughter of Feliciana Trujillo deceased daughter of Guadalupe Baca deceased, Marto Lopez son of said Feliciana Trujillo, Altagracia Lopez wife of Francisco Ramirez and daughter of said Feliciana Trujillo, Jesus Maria Trujillo son of Guadalupe Trujillo deceased, who was a daughter of Guadalupe Baca deceased, we Josefa Salas, wife of Jose Martinez, and daughter of Rosa Baca deceased, daughter of Luis Maria Baca, Dolores Baca, daughter of said Rosa Baca deceased, we Espendion Baca and Refugia Baca, children of Francisco Baca deceased, son of said Rosa Baca, we Josefa Baca y Sanchez daughter of Luis Maria Baca and wife of Juan Luis Montoya, we Antonio Garcia, Francisco Garcia, Maria Inez Garcia, Jesus Maria Garcia and Maria de las Angeles Garcia, children of Juana Baca deceased, daughter of Luis Maria Baca and wife of Jose Garcia, we Josefa Baca y Lucero, daughter of Luis Maria Baca and wife of Luis de Lao, we Altagracia Baca, daughter of Luis Maria Baca and wife of Francisco Martinez, I Tomas Cabeza de Baca owner of the interest and claim of Manuel Baca, son of Luis Maria Baca, to his intent as heir of Luis Maria Baca, as appears by deed of conveyance executed the 17th day of June, 1861, and duly recorded in the record books of the register of deeds for Santa Ana county, letter D, page- 6 & 7, and I Tomas Cabeza de Baca, owner of the interest of Ignacio Baca, only son and heir of Ramon Baca deceased, son of Luis Maria Baca, as appears by deed of said Ignacio Baca and Maria Guadalupe Hurtado, to said Tomas Cabeza de Baca, executed on the first day of June, 1861, and duly recorded in the Record Book D of Deeds for Santa Ana County, page- 5 & 6. I Jesus Maria Cabeza de Baca, owner by purchase of the interest of Jesus Baca y Lucero 1°, son of Luis Maria Baca, as appears by deed of said Jesus Baca y Lucero 1°, and Maria Rafaela Armijo his wife, executed the 20th day of August, 1861, and recorded in the Record Book Letter D, pag- 12 and 13 of the register of deeds for Santa Ana county, and I Francisco Baca, owner by purchase of the interest of Domingo Baca, son of Luis Maria Baca for and in consideration of the services of John S. Watts for many years in and about the business of said heirs of Luis Maria Baca, as the attorney of

said heirs, and for the further consideration of three thousand
69 dollars, paid by the said John S. Watts to Tomas Cabeza de Baca, our attorney-in-fact, have bargained, sold and conveyed, and by these presents bargain, sell and convey to the said John S. Watts of Santa Fé, New Mexico, and to his heirs and assigns forever, all our right, title, interest and claim in and to the following lands, located upon by us, as heirs of Luis Maria Baca, under the 6th section of an act of Congress approved June 21st, 1860, to wit: Location No. 2 situate on the Canadian or Red river in the Territory of New Mexico and described as follows, to wit: Beginning at the corner to sections 21, 22, 27 & 28 in township 13 north of the base line and range 29 east of New Mexico principal meridian, running from said initial point, north six miles, eighteen chains and twenty-two links, thence east twelve miles, thirty-six chains and forty-four links, thence west twelve miles, thirty-six chains and forty-four links, thence north six miles, eighteen chains and twenty-two links, to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres, and thirty-nine hundredths of an acre, more or less; also section No. 3, situate in the Territory of Arizona, formerly in Donna Ana county, New Mexico, and described as follows, to wit: Commencing at a point one mile and a half from the base of the Salero mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence east twelve miles, thirty-six chains and forty-four links, thence north twelve miles, thirty-six chains and forty-four links, to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre more or less. Also location No. 4, situate in Costilla county, Colorado Territory, formerly in Taos county, New Mexico, known and described as follows, to wit: Beginning at a point on the eastern edge of the San Luis valley, where the thirty-eighth degree of latitude crosses the dividing line of the plain and mountain, thence east along said parallel of latitude four and one-half miles, thence south at a right angle to said parallel of latitude twelve and one-half miles, thence west at a right angle twelve and one half miles, thence north at a right angle twelve and one-half miles, to the aforesaid parallel of latitude, thence east with said parallel of latitude eight miles to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre more or less.

To have and to hold the lands aforesaid with all the appurtenances and privileges to the same belonging, to the said John S.
70 Watts and his heirs forever, in fee-simple, and the said heirs of Luis Maria Baca in person and by their attorney-in-fact, Tomas Cabeza de Baca covenant with the said John S. Watts and his heirs, for themselves and their heirs as follows, to wit:

1. That they are seized in fee of the lands aforesaid and have good right and title to the same.

2. That said lands are free from encumberances, and that they have full power to sell and convey the same.

3. That the said John S. Watts and his heirs and assigns shall quietly enjoy said lands forever free from all claims or demands of the said heirs of Luis Maria Baca, their heirs, executors or administrators.

4. That we will defend and protect the title aforesaid against all claim or claims of title arising from or under us as heirs of said Luis Maria Baca, or under our heirs, executors and administrators.

5. That the said John S. Watts and his heirs and assigns shall forever enjoy the lands aforesaid in as full and ample a manner as the heirs of Luis Maria Baca held and enjoyed the said lands just before the execution of this conveyance.

In witness whereof we have hereunto set our hands and seals this 1st day of May, 1864.

(U. S. rev. stamp, $5.00.)

DIEGO BACA. [SELLO.]
LUIS BACA. [SELLO.]
DOMINGO BACA. [SELLO.]
JESUS MA. BACA, [SELLO.]
Purchaser of the Interest of Jesus Baca y Lucero 2°.
FELIPE BACA. [SELLO.]
LUIS DE LOS O'ESPERO DE JOSEFA BACA. [SELLO.]
JOSEFA BACA. [SELLO.]
MARIA ALTAGRACIA BACA. [SELLO.]
PRUDENCIO BACA. [SELLO.]
TOMAS BACA, [SELLO.]
Attorney-in-fact for the Heirs of Juan Antonio Baca.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Jose Baca.
TOMAS DE BACA, [SELLO.]
Purchaser of the Interest of the Heirs of Ramon Baca.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact of the Heirs of Mateo Baca.
71 TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Jesus Baca y Lucero.
TOMAS DE BACA, [SELLO.]
Purchaser of the Interest of Manuel Baca.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Guadalupe Baca.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Rosa Baca.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Josefa Baca y Sanchez.
TOMAS DE BACA, [SELLO.]
Attorney-in-fact for the Heirs of Juana Paula Baca.
JESUS MA. BACA, [SELLO.]
Purchaser of the Interest of Jesus Baca y Lucero 2°.
FRANCISCO MARTIN, ESPOSO DE MARIA ALTAGRACIA BACA. [SELLO.]

Executado y firmando en la presencia de Bernabé Baca y Altagracia Sanchez.

(Here follow certificates of (acknowledgement) and of record.)

Warranty Deed.

Heirs of Luis Maria Baca
to
John S. Watts.

Filed for record at 4½ o'clock p. m., Sept. 3d, 1875.
GEO. S. PARSONS, *Recorder.*

Know all men by these presents we, Quinna Baca of Santa Fé, New Mexico, Romaldo Baca of Las Vegas, New Mexico, Guadalupe Baca, wife of Jesus Maria Leiba and Jesus Maria Leiba, of Pena Blanca, New Mexico, Martino Baca of Las Vegas, New Mexico, and Paulina Baca of Santa Fé, New Mexico, children and heirs-at-law of Miguel Baca, deceased, a son and heir of Luis Maria Baca, deceased, for and in consideration of the services of John S. Watts as our attorney, have sold, bargained and conveyed and by these presents do (*well*), bargain and convey to the said John S. Watts and his heirs and assigns, forever, one-half of our interest claim and right in and to all the lands located upon under the 6th section of an act of Congress approved June 21", 1860, location No. 1, 2, 3, 4, & 5 having been made under said act each containing nine hundred and ninety-nine thousand 289.39 acres of land situate
72 in New Mexico as the boundaries of said Territory existed on the 21" of June 1860 and for and in consideration of one thousand dollars to us in hand paid by the said John S. Watts we have bargained, sold and conveyed, and do, by these presents, bargain, sell and convey unto the said John S. Watts and his heirs forever the remaining half of our interest, title and claim to the lands located upon under said 6th section of said act of Congress, said locations being described as follows, to wit: Location No. 1, beginning at a point in the Vallies Grandies called the Puerto de Tarmillo, running thence east six miles 18 chains and 22 links, thence north six miles 18 chains and 22 links, thence west twelve miles 36 chains and 44 links, thence south twelve miles 36 chains and 44 links, thence east twelve miles 36 chains and 44 links, thence north six miles 18 chains and 22 links.

Location No. 2 being described as follows, to wit: Beginning at the corner of sections 21, 22, 27 & 28 in township 13 north of the base line and range 29 east of New Mexico principal meridian as a beginning point, running thence north six miles eighteen chains and 22 links, thence east twelve miles 36 chains and 44 links; thence west twelve miles 36 chains and 44 links; thence north six miles 18 chains and 22 links to the place of beginning, containing ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine hundredths of an acre.

Location No. 3 being described as follows, to wit: Beginning at a

point one mile and a half from the base of the Saleno mountains in a direction north 45° east of the highest point of said mountain, running thence west twelve miles, 36 chains and 44 links, thence south 12 miles 36 chains and 44 links, thence east 12 miles 36 chains and 44 links, thence north 12 miles 36 chains and 44 links to the place of beginning, containing 99,289.36 acres. Location No. 4 being described as follows, to wit:

Beginning at a point on the eastern edge of the San Luis valley where the 38° of latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude four and one-half miles; thence south at right angle to said parallel of latitude, twelve and one-half miles; thence west at a right angle twelve and one-half miles; thence north at a right angle twelve and one-half miles; thence east with said parallel of latitude eight miles to the point of beginning, containing 99,289.39 acres more or less.

Location No. 5 being described as follows, to wit: Beginning at that point on the River Pecos where the reservation of Fort Sumner strikes the river above said fort and extending the line from
73 that point, so as to form a square above the reservation survey an equal distance on each side of the river for the southern line, containing 99,289.39 acres more or less.

To have and to — to the said John S. Watts and his heirs and assigns forever all our right, title, interest and claim in and to the lands aforesaid in as full and ample a manner as we had and held the same just before the execution of this deed.

In witness whereof, we have hereunto set our hands and seals this 1st day of May, 1864.

her
JUANNA x BACA. [L. S.]
mark.
GUADALUPE BACA. [SEAL.]
JESUS LEIVA. [SEAL.]
her
PAULENE x BACA. [SEAL.]
mark.
MARTINO C. DE x BACA. [SEAL.]
mark.
his
ROMALDO x BACA. [SEAL.]
mark.

Executado y Fermando en la presencia delos Testigos Bernabe Baca y Atanacios Sauchos.

Marm vixi Tafoyce Testigos. Testigos a la formado Martina Baca, Wm. Braden, Edwin J. Edgar.

(Here follow certificates of (acknowledgement) and of record.)

Mr. VAILE: "I would state to the court and counsel that a suit was brought by John S. Watts against William Gilpin, based upon a contract which is set out in the bill of complaint, relating to this title. In that suit a cross-bill was filed, as well as an answer, and the result of the proceeding, after pending some years, was a decree

to the effect that the interest of Mr. Watts, plaintiff in that action, and the defendant to the cross-bill therein, should be conveyed to William Gilpin, the defendant in the original action and complainant in the cross-bill. To show jurisdiction to enter the decree I suppose at least the filing of these papers should be shown, and unless counsel desires them to go into the record, I shall simply show the filing."

Mr. SMITH: "I think if counsel would offer the contract and the decree, and the evidence of its rendition, there would be no objection to it. It would serve all the purposes of the record."

Whereupon, counsel for plaintiff offered in evidence said agreement between John S. Watts and William Gilpin, incorpo-
74 rated as Exhibit "A" in the suit of John S. Watts against William Gilpin, commenced in the district court of Arapahoe county, Territory of Colorado, November 9th, 1869, being cause numbered 1771 of that court; said agreement being as follows:

Agreement between John S. Watts and William Gilpin.

Articles of agreement, sale, and transfer of certain property, real and personal, made this seventeenth day of February, A. D. 1862, between John S. Watts, of New Mexico, of the first part, and William Gilpin, of Colorado Territory, of the second part.

Whereas, by act of Congress of the United States, approved June 21st, 1860 entitled "An act to confirm certain private land claims in the Territory of New Mexico," in section 6 of the same, it is provided: "That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico, to make survey and location of the lands so selected by the said heirs of Baca, when thereunto required by them; provided, however, that the right hereby granted to the said heirs of Baca shall continue in force during three years from the passage of this act and no longer." And,

Whereas, the said John S. Watts, as agent and attorney for the heirs of Luis Maria Baca aforesaid, if fully empowered to make contract, sale and conveyance of the property, real and personal, of the heirs aforesaid, in the transfer and location of all or a portion of said five land grants or claims:

It is agreed between said John S. Watts, of the first part, and said William Gilpin, of the second part, as follows:

The said John S. Watts sells and conveys to the said William Gilpin, one of the said five grants or claims of land, estimated to contain one hundred thousand acres, for the sum of thirty cents per acre, payable in five equal annual instalments, (commenci-g) two years after the date of this sale and transfer; the said principal purchase-money to bear interest at five per centum per annum from the same

date, payable semi-annually, but the first payment of said interest to be paid simultaneously with the first instalment of principal aforesaid.

And the said John S. Watts, in consideration of the above payments and conditions, guarantees to the said William Gilpin
75 full transfer, possession and authority to locate said grant or claim of land, and further guarantees full conveyance and title in fee-simple to the lands, when the same shall be duly located, paid for and surveyed. And it is further agreed that, if at any time after the said location and survey shall be perfected, the full amount of purchase-money and interest shall be paid by the said William Gilpin, then the said John S. Watts shall make and perfect the conveyance and title to the said lands.

In testimony whereof we have hereunto set our hands and seals the day and year first above mentioned.

WILLIAM GILPIN. [SEAL.]
JOHN S. WATTS. [SEAL.]

Thereupon it was stipulated by and between the parties in open court that the contract just read in evidence was the subject of certain litigation between John S. Watts and William Gilpin, in the district court of Arapahoe county, Territory of Colorado, having jurisdiction of the parties and of the property in controversy, and resulted in a decree entered on the 3rd day of March, 1877.

Thereupon, the plaintiff, to further maintain the issues upon his part, offered in evidence the following other documents numbered and designated as exhibits in said cause, as follows, to wit:

EXHIBIT No. 10½.

STATE OF COLORADO, }
County of Arapahoe, } *ss.*:

District Court, Arapahoe County.

Pleas in the district court of the second judicial district of Colorado, sitting within and for the county of Arapahoe, before the Honorable Victor A. Elliott, judge, at a term thereof begun and held at the court-house, in the city of Denver, in said county, on the second Tuesday, it being the ninth day, of January, A. D. one thousand eight hundred and seventy-seven.

Present: The Honorable Victor A. Elliott, judge of said court; David B. Graham, Esquire, dist. att'y of said judicial dist.; David J. Cook, Esquire, sheriff of said county; Robert Chalfant, Esquire, clerk of said court.

76 Be it remembered, that heretofore, and on, to wit, the third day of March, A. D. 1877, the same being one of the regular juridical days of the January term, A. D. 1877, of said court, the following proceedings (*inter alia*) were had and entered of record in said court in a certain cause therein depending, to wit:

(Here follows the decree; and said decree being set out in full in the following Exhibit No. 11, it is here omitted.)

EXHIBIT No. 11.

Master's Deed.

Wm. B. Mills, master in chancery,
to
William Gilpin.

This indenture, made the sixth day of November, in the year of our Lord one thousand eight hundred and seventy-seven, between William B. Mills, one of the masters in chancery of the district court of the second judicial district of the State of Colorado, sitting within and for the county of Arapahoe, of the first part, and William Gilpin, of the said county of Arapahoe, of the second part:

Witnesseth: that whereas, at a term of the said district court, held for the said county of Arapahoe, at Denver, in said county, on the ninth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, it was, among other things, ordered, adjudged and decreed by the said court, in a certain cause then depending in said court, between John S. Watts and Wilson Waddingham, complainants, and the said William Gilpin, defendant, in the words and figures following, to wit:

"JOHN S. WATTS and WILSON WADDINGHAM
"*vs.*
"WILLIAM GILPIN. } 1771. In Chancery.

"This cause now coming on to be heard, upon the original and supplemental bills filed herein, and the answers of the said defendant thereto, and upon the cross-bill of the said defendant and the answers thereto, and upon all the pleadings, proofs taken therein and the stipulations and agreements of the parties filed herein. And the counsel for the respective parties having been heard, and the court being fully advised in the premises, and it appearing to the court that a good title can be made by the said complainants to the premises comprised in the agreement between the parties to this cause, mentioned in the pleadings therein, and dated the 17th day of February, A. D. 1862.

"It is therefore ordered, adjudged and decreed, and this court does order, adjudge and decree that the said agreement, so
77 made and entered into between the said complainant John S. Watts and defendant, and subsequently transferred to said complainant Waddingham, together with the lands referred to therein and duly proved in this cause, be specifically performed. And it is further ordered, adjudged and decreed that the said complainants in the original and supplemental bills and the said defendants in the cross-bill in this cause, execute and deposit with the clerk of this court all proper, good and sufficient conveyances, in fee-simple, free from all incumbrances, including all taxes heretofore assessed on said land up to and including the year A. D. 1876, with covenants of warranty against all persons claiming by, through or

under the said complainant Waddingham, or his grantees, to be delivered to said defendant as hereinafter provided, for the premises described in the said agreement between the said Watts and Gilpin, and more particularly described as follows, to wit: Beginning at a point on the eastern edge of the San Luis valley, where the thirty-eighth degree of latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude, four and one-half miles; thence south, at a right angle to said parallel of latitude, twelve and one-half miles; thence west, at a right angle, twelve and one-half miles; thence north at a right angle, twelve and one-half miles to the aforesaid parallel of latitude; thence east with said parallel of latitude eight miles to the place of beginning, containing ninety-nine thousand two hundred and eighty-nine acres and thirty-nine one-hundredths of an acre, the same being now situated in Saguache county and State of Colorado, said deeds of conveyance to be approved by this court in case the parties differ about the same. And it is further ordered, adjudged and decreed that, upon the filing of all such conveyances with the clerk of this court, to be delivered to the said defendant as hereinafter provided, the said defendant shall pay unto the said complainant, Wilson Waddingham, as the grantee of the said John S. Watts, or to the clerk of this court for his use, whose receipt therefor shall discharge the said defendant from any default herein, the sum of fifty-two thousand one hundred and eighty-four & $\frac{8}{100}$ dollars, being the full amount of principal and interest due on said agreement, up to the date of this decree, according to the tenor and effect thereof.

"And it is further ordered, adjudged and decreed that upon the filing with the clerk of this court proper and good & sufficient deeds of conveyance as hereinbefore provided for, the said defendant shall pay to the said complainant Waddingham, or to the clerk of
78 this court for his use, the sum of thirty thousand dollars as part and parcel of said principal sum before mentioned; that on or before the expiration of ninety days from the date of this decree, the said defendant, as another portion of said principal sum before mentioned, shall pay to the clerk of this court, or to Samuel G. Collins, Esqr., cashier of the Exchange Bank of Denver, the further sum of seventeen thousand five hundred and eighty-seven $\frac{5}{100}$ dollars, with interest on said last-mentioned sum at the rate of one & one-half per cent. per month from the date of this decree until the time of such payment, said last-mentioned sum being the amount of a certain deed of trust given by the said Wilson Waddingham to said Collins, as trustee, for the use of one Samuel Kelly dated September the 18th, A. D. 1875, at the time of which said last-mentioned payment the clerk of this court is directed and ordered to deliver to the said defendant the release deed of the said Collins to the said Waddingham, releasing said premises from said trust deed, and reconveying the same to said Waddingham, which said release deed is to be deposited with the clerk of this court to be delivered as aforesaid upon the making of said last-mentioned payment; that the balance of said sum first aforesaid mentioned, amounting to the sum of four thousand five hundred & ninety-seven $\frac{3}{100}$ dollars, is to be

paid to the clerk of this court, or to the said complainant Waddingham, or his agent, on or before the expiration of six months from the date of this decree, with interest on the same at the rate of ten per cent. per annum from the date of this decree until the same is paid; and it is further ordered, adjudged and decreed that, upon the payment of the last of said (instalments), as provided in this decree, the clerk of this court shall deliver to the said defendant the deeds of conveyance for the property described in this decree and hereinbefore provided to be filed with said clerk, together with all other deeds and title papers now in the possession of said Waddingham, and deposited with said clerk by him for that purpose. And it is further ordered, adjudged and decreed that, at the payment of the full amount of the contract price of said land as first mentioned in this decree, if the said complainant Watts has failed to execute & deposit with the clerk of this court a good, proper and sufficient deed conveying to said defendant all his right, title and interest in and to the premises described in the original and cross bills filed herein, according to the terms of said agreement, then upon the application of the said defendant, William B. Mills, Esqr., one of the masters in chancery of this court, is hereby authorized and empowered to make, execute and deliver to the said defendant a good and sufficient deed conveying to the said defendant all the
79 right, title and interest of said complainant Watts, in and to the premises before described.

"And it is further ordered, adjudged and decreed that, if the said defendant make default in the payment of the sum of money first provided for in this decree as the contract price of said land & the interest thereon, then and in such case the said contract is hereby cancelled and held for naught, and the said defendant is hereby foreclosed and forever barred from all equity in and to the same.

"And it is further ordered, adjudged and decreed that the said defendant pay the costs of this suit to be taxed by the clerk.

"(Signed) VICTOR A. ELLIOTT, *Judge, &c.*"

And whereas, the said defendant William Gilpin has fully paid each and every of the sums of money, so as aforesaid decreed to be paid by him, being the full amount of the contract price of said land and interest (thereof); and whereas, the said complainant, John S. Watts, has failed to execute and deposit with the clerk of said court, a good, proper and sufficient deed, conveying to the said defendant William Gilpin, all his right, title and interest in and to the premises described in the said original and cross bills filed in said cause, according to the terms of said agreement; and whereas, the said defendant William Gilpin has made application to me the said William B. Mills, master in chancery as aforesaid, for a good and sufficient deed conveying to him the said Gilpin, all the right, title and interest of said Watts, in and to the said lands as provided in and by said decree.

Now, therefore, I, William B. Mills, master in chancery as aforesaid, and party of the first part to these presents, in order to carry into effect and complete the provisions of said decree, and by virtue

of the statute in such cases made and provided and the power and authority in me vested by said decree, and in consideration of the premises and of the sum of ten dollars to me paid by the said William Gilpin, party of the second part, the receipt whereof is hereby acknowledged, have granted, conveyed and confirmed, and by these presents do grant, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, the following-described tract of land situated in the county of Saguache and State of Colorado, to wit:

Beginning at a point on the eastern edge of the San Luis valley, where the thirty-eighth degree of latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude four and one-half miles; thence south, at a right angle
80 to said parallel of latitude, twelve and one-half miles; thence west, at a right angle, twelve and one-half miles; thence north, at a right angle, twelve and one-half miles, to the aforesaid parallel of latitude; thence east, with said parallel of latitude, eight miles, to the place of beginning; containing ninety-nine thousand and two hundred and eighty-nine acres, and thirty-nine one-hundredths of an acre; together with all and singular the right, title and interest of the said John S. Watts, and the privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining.

To have and to hold the said premises above described and hereby intended to be granted and conveyed, unto the said party of the second part, his heirs and assigns, to his and their only proper use and benefit forever.

In witness whereof, I, the said party of the first part, master in chancery, as aforesaid, have hereunto set my hand and seal the day and year first above written.

WILLIAM B. MILLS. [SEAL.]
Master in Chancery.

STATE OF COLORADO, }
Arapahoe County, } ss:

On this sixth day of November, A. D. 1877, before me personally appeared William B. Mills, master in chancery, known to me to be the person described in, and who executed this indenture, and acknowledged that he executed the same for the uses and purposes therein mentioned.

Witness my hand and notarial seal this 6th day of November, 1877.

[SEAL.] LEVIN C. CHARLES,
Notary Public.

STATE OF COLORADO, }
County of Saguache, } ss:

This instrument was filed for record at 10 o'clock a. m., October 18th, 1879, and duly recorded in Book 5, page- 321, 322, 323, 324 & 325.

C. W. BALDWIN, *Recorder.*

Fees $7.00.
9—154

STATE OF COLORADO, } ss:
County of Saguache, }

I, T. J. Fitzpatrick, county clerk and *ex officio* recorder in and for the county in the State aforesaid, do hereby certify that the
81 above and foregoing is a true, correct, full and complete copy of a master's deed, William B. Mills, master in chancery, to William Gilpin, and of the whole thereof, as the same appears of record in my said office, and that the same was duly entered of record on the 18th day of Oct., A. D. 1879, at 10 o'clock a. m., in Book 5, on page 321, of the records of said county.

In testimony whereof I have hereunto set my hand and affixed my official seal at Saguache, this 30th day of June, A. D. 1892.

[SEAL.] T. J. FITZPATRICK,
County Clerk.

EXHIBIT No. 12.

Quitclaim Deed.

Wilson Waddingham
to
William Gilpin.

This deed, made this third day of March, in the year of our Lord, one thousand eight hundred and seventy-seven, between Wilson Waddingham, of the county of Arapahoe in the State of Colorado, of the first part, and William Gilpin, of the same place, of the second part:

Witnesseth: That the said party of the first part, for and in consideration of the sum of fifty-two thousand, one hundred and eighty-seven dollars and ninety-eight cents, to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath remised, released, sold, conveyed, and quitclaimed, and by these presents doth remise, release, sell, convey and quitclaim unto the said party of the second part, his heirs and assigns, (forever), all the right, title and interest, claim and demand, which the said party of the first part hath in and to the following-described real property, situate, lying and being in the county of Saguache and in the State of Colorado, namely:

Beginning at a point on the eastern edge of the San Luis valley where the thirty-eighth "38" degree of latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude four and one-half miles "4½" miles; thence south, at a right angle to said parallel of latitude, twelve and one-half miles "12½;" thence west, at a right angle, twelve and one-half "12½" miles; thence north at a right angle twelve and one-half "12½" miles to the aforesaid parallel; thence east along said parallel of latitude
eight miles, to the place of beginning, containing ninety-nine
82 thousand two hundred and eighty-nine "99,289" acres and thirty-nine "$\frac{39}{100}$" one-hundredths of an acre more or ss, being location number four "3" in a deed from the heirs of Luis

Maria Baca to John S. Watts, bearing date the first day of May, 1864, recorded in volume "I," page three hundred and thirteen "313" etc., Costilla county records, in said State of Colorado.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining; and all the estate, right, title, interest and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

And the said party of the first part, against any and all taxes heretofore assessed up to and including the year A. D. 1876, upon said above-described property, as well also against any act or thing done by said first party incumbering, conveying or clouding in any way the title thereto, or any grantee of him, will warrant and forever defend by these presents.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first hereinabove written.

WILSON WADDINGHAM. [L. S.]

(Here follow certificates of (acknowledgement) and of record.)

EXHIBIT No. 13.

William Gilpin
to
George H. Adams.

This deed of indenture, made this tenth day of December, in the year of our Lord one thousand eight hundred and eighty-five, between William Gilpin, of the city of Denver, county of Arapahoe and State of Colorado, party of the first part, and George H. Adams, of the county of Saguache, in the said State of Colorado, party of the second part.

Witnesseth, that the party of the first part, for and in consideration of the sum of two hundred thousand dollars, to the said party of the first part in hand paid by the said party of the second part, has granted, bargained, sold and conveyed and by these presents, doth grant, bargain, sell and convey, unto the said party of
83 the second part, his heirs and assigns forever, all the following parcel or tract of land situated in the county of Saguache, in said State of Colorado, to wit:

All that certain piece, parcel and tract of land, with the buildings and improvements thereon situated, in the county of Saguache and State of Colorado aforesaid, containing ninety-nine thousand two hundred and eighty-nine and thirty-nine one-hundredths (99,289.39) acres of land more or less, and more particularly described by metes and bounds as follows, to wit: Beginning at a point on the eastern edge of the San Luis valley where the thirty-eight (38) degree of north latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude four and one-half miles; thence south at a right angle to said parallel of latitude twelve and

one-half miles; thence west at a right angle twelve and one-half miles; thence north at a right angle twelve and one-half miles to the aforesaid parallel of latitude; thence east with said parallel of latitude eight miles to the place of beginning, as surveyed by the surveyor general of Colorado, and as appears by his field-notes now on file in the office of the said surveyor general of the State of Colorado aforesaid, which said parcel, piece and tract of land so as aforesaid by metes and bounds described is commonly known as and called the "Baca Grant No. 4" located under and by virtue of an act of Congress approved on the twenty-first day of June in the year of our Lord one thousand eight hundred and sixty, in and by which the said heirs of Luis Maria Baca were authorized to locate the said above-described lot and parcel of land.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim and demand, whatsoever, of the said party of the first part, either in law or equity, of, in or to the above bargained premises, with the hereditaments and appurtenances included herein, all and singular the lodes hereinafter mentioned and the royalties, considerations and benefits accruing and hereafter to accrue therefrom, to the party of the first part his heirs and legal representatives and assigns.

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part his heirs and assigns forever. Provided always nevertheless, that this deed of conveyance is signed, sealed, executed and
84 delivered, subject to the terms, covenants and conditions contained in a certain indenture of lease made by the party of the first part to said party of the second part his heirs and assigns for the period of ten years, commencing the eighth day of November, 1878, and subject to all taxes on said property; the party of the second part assuming the same, and subject also to the terms, covenants and liabilities of a certain indenture of lease, executed and delivered by the said party of the first part on the twenty-fourth day of January, A. D. 1883, to the San Luis Gold Mining and Milling Company, a corporation duly organized under the laws of the State of Colorado, and conveying a leasehold interest for and during the full term of ninety (90) years, in a certain mining property commonly known as "The Eastern Star lode" and the "Gold Legion mine," for a certain good and valuable consideration, more particularly set forth in the said lease and which said indenture of lease is recorded in the office of the clerk and recorder of the county of Saguache aforesaid to which reference is hereby made for greater certainty. And further provided always nevertheless and it is the true intent and meaning of these presents, that this deed of conveyance is made, signed, sealed, executed and delivered, in every respect and in all of its parts and provisions, subject always to the terms and conditions of any and all other leases at any time heretofore made by the said party of the first part to any party or parties whomsoever, and now in force releasing and conveying any interest of the

said party of the first part in or to any mines or mining claims and mining property, situated within or upon the above-bargained premises; it being hereby distinctly understood and agreed that the said party of the first part does hereby convey and assign to the said party of the second part, his heirs and assigns, under and by virtue of this deed of conveyance, all right, title, interest and claim and demand in and to all royalties, considerations, rents, profits connected with or arising from or out of any and all such mining leases hereinbefore mentioned; and the said William Gilpin, party of the first part, for himself, his heirs, executors and administrators, does covenant and agree, to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents, he is well seized of the premises above conveyed, as and of a good, sure, perfect, absolute and indefeasible estate of inheritance in law in fee-simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are clear and free of all other grants, bargains, sales (*leins*), taxes, assessments and incumbrances of whatever kind and nature soever, and the
85 above-bargained premises in the quiet and peaceful possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, I, the said William Gilpin, party of the first part as aforesaid, shall and will warrant and forever defend.

Provided always that this covenant of warranty is intended and is expressly written herein to warrant and defend the title and peaceful possession of the above-described piece, parcel and tract of land with the buildings and improvements thereon unto the said party of the second part, his heirs and assigns as aforesaid, subject nevertheless in all respects to the leases and other instruments of writing obligatory here and before mentioned and referred to, as transferring to certain parties therein stated certain leasehold interests for a term of years of, in and to certain parts and parcels of the said described tract of land with the privileges and appurtenances thereunto in anywise belonging or appertaining according to the terms and tenor of said lease and instrument of writing as aforesaid.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

WILLIAM GILPIN. [SEAL.]

STATE OF COLORADO, }
County of Arapahoe, } ss:

I, E. A. Clark, a notary public duly appointed and commissioned in and for the county and State aforesaid, do hereby certify that William Gilpin who is personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 10th day of December, A. D. 1885.

[SEAL.] E. A. CLARK,
Notary Public.

EXHIBIT No. 14.

Deed of Conveyance.

Geo. H. Adams to Quincy A. Shaw. } No. 13989.

This deed of indenture made this fifteenth day of March, in the year of our Lord one thousand eight hundred and eighty-
86 seven, between George H. Adams, of the county of Saguache and State of Colorado, party of the first part, and Quincy A. Shaw, of Boston, in the county of Suffolk and State of Massachusetts, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one thousand dollars and other good and valuable considerations, to the said party of the first part in hand paid by the said party of the second part, has granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all the following-described parcel or tract of land situate in the county of Saguache, in said State of Colorado, to wit: all that certain piece, parcel and tract of land, with the buildings and improvements thereon, situate in the county of Saguache and State of Colorado aforesaid, containing ninety-nine thousand two hundred and eighty-nine and thirty-nine one-hundredths acres more or less, and more (particularly) described by metes and bounds as follows to wit: Beginning at a point on the eastern edge of the San Luis valley, where the thirty-eighth degree of north latitude crosses the dividing line of the plain and mountain; thence east along said parallel of latitude four and one-half miles; thence south at a right angle to said parallel of latitude twelve and one-half miles; thence west at a right angle twelve and one-half miles; thence north at a right angle twelve and one-half miles, to the aforesaid parallel of latitude; thence east with said parallel of latitude eight miles to the place of beginning, as surveyed by the surveyor general of Colorado and as appears by his field-notes now on file in the office of the said surveyor general of the State of Colorado aforesaid, which said parcel, piece and tract of land so as aforesaid by metes and bounds described, is commonly known as and called the "Baca Grant No. 4" located under and by virtue of an act of Congress approved on the twenty-first day of June in the year of our Lord one thousand eight hundred and sixty in and by which the heirs of Luis Maria Baca were authorized to locate the said above-described lot and parcel of land; together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all

the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or equity, of, in or to the above-bargained premises, with the hereditaments and appurtenances included herein all and singular the lodes hereinafter mentioned, and the royalties, considerations and benefits accruing and hereafter to accrue therefrom, to the party of the first part, his heirs and legal representatives and assigns. To have and to hold the said prem-
87 ises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever. Provided always nevertheless, that this deed of conveyance is signed sealed, executed and delivered subject to the terms, covenants, and conditions contained in a certain indenture of lease made by William Gilpin to said George H. Adams and his heirs and assigns, for the period of ten years commencing the eighth day of November, 1878, and subject also to the terms, covenants and liabilities of a certain indenture of lease executed and delivered by the said William Gilpin on the twenty-fourth day of January, A. D. 1883, to the San Luis Gold Mining and Milling Company, a corporation duly organized under the laws of the State of Colorado, and conveying a leasehold interest for and during the full term of ninety years, in a certain mining property commonly known as "the Eastern Star lode" and the "Gold Legion mine," for a certain good and valuable consideration, more particularly set forth in the said lease, and which said indenture of lease is recorded in the office of the clerk and recorder of the county of Saguache aforesaid, to which reference is hereby made for greater certainty; and further provided always nevertheless, and it is the true intent and meaning of these presents that this deed of conveyance is made, signed, sealed, executed and delivered in every respect and in all of its parts and provisions, subject always to the terms and conditions of any and all other leases at any time heretofore made by the said party of the first part to any party or parties whomsoever, and now in force, releasing and conveying any interest of the said party of the first part, in or to any mines or mining claims and mining property situate within or upon the above-bargained premises, it being hereby distinctly understood and agreed, that the said party of the first part doth hereby convey and assign to the said party of the second —, his heirs and assigns, under and by virtue of this deed of conveyance, all right, title, interest and claim and demand in and to all royalties, considerations, rents, profits, connected with or arising from or out of any and all such mining leases hereinbefore mentioned, and the said George H. Adams, party of the first part, for himself, his heirs, executors and administrators, does covenant and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed as and of a good, sure, perfect, absolute and indefeasible estate of inheritance in law in fee-simple and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear of all other

grants, bargains, sales, liens, taxes, assessments and incum-
88 brances of whatever kind and nature soever. And the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, I, the said George H. Adams, party of the first part as aforesaid, shall and will warrant and forever defend; provided always that this covenant of warranty is intended and is expressly written herein, to warrant and defend the title and peaceable possession of the above-described piece, parcel and tract of land with the buildings and improvements thereon unto the said party of the second part, his heirs and assigns as aforesaid, subject nevertheless in all respects to the leases and other instruments of writing obligatory hereinbefore mentioned and referred to, as transferring to certain parties herein stated certain leasehold interests for a term of years of, in and to certain parts and parcels of the said described tract of land with the privileges and appurtenances thereunto in anywise belonging or appertaining, according to the terms and tenor of said lease and instrument of writing as aforesaid.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

[SEAL.] GEORGE H. ADAMS.

Signed and sealed in presence of—
CHAS. HALL ADAMS.

(Here follow certificates of (acknowledgement) and of record.)

It was thereupon stipulated by and between the parties to this cause, in open court, that the land described in the complaint as being in the possession of the defendant, and for the recovery of which this suit is brought, is within the outer boundaries of Baca Grant No. 4, and is near the place known as Sangre de Cristo, near the bank of Cottonwood creek, and that the same is called by the defendant the Eastern Star mine.

TUESDAY, *May* 21, 1895.

To further maintain the issues on his part, the plaintiff introduced oral testimony as follows:

GEORGE H. ADAMS, a witness on the part of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. VAILE:

Q. Mr. Adams, state your name to the court and jury.
A. George H. Adams.
89 Q. Mr. Adams, where do you live?
A. Crestone.
Q. Do you live on Baca Grant No. 4?
A. I do.

Q. In what county?
A. Saguache county.
Q. How long have you lived there or in that vicinity?
A. Since 1869.
Q. Are you at present in charge of the Baca Grant No. 4?
A. I am.
Q. Do you know the defendant, Murry M. Kellogg?
A. I do.
Q. Are you acquainted with and do you know the locality of that property of which he has taken possession, and is now occupying, which he calls the Eastern Star mine?
A. I do.
Q. You may state to the jury whether or not Baca Grant No. 4 has for purposes of convenience in description and use been subdivided by lines running through it north and south, east and west?
A. Yes, sir; it has been sectionized.
Q. In the numbered sections inside of the grant, then, you may state in what one of them this Eastern Star mine, so called, is situated?
A. It is situated in the northeast quarter of section 22, township one (1) north, one (1) east.
Q. Are you the grantee, George H. Adams, mentioned in the deed from William Gilpin?
A. Yes, sir.
Q. In that deed and in a subsequent deed shortly afterwards made from yourself to Quincy A. Shaw, there is a reservation of a lease of property called the Eastern Star lode and the Gold Legion mine, the lease being to a company called the San Luis Gold Mining and Milling Company; state whether or not that company continued in possession for any length of time of this property under that lease?

By Mr. SMITH: I object, if your honor please——
The COURT: He may ask the question.
Mr. SMITH: We save an exception.

A. They did not.
Q. What became of the property so far as their occupancy and possession of it was concerned?
A. They turned it over to me.
Q. During the period of their occupancy was there any mill erected upon the property at that time?
90 A. There was a mill there, and they repaired it and added some machinery to it, and after that turned it over to the company—to me, rather.
Q. What was done with the mill and machinery after they turned over the property to you?
A. It was leased to other parties.
Q. Was it at any time dismantled, and the machinery taken away?
A. Yes.
Q. By whom?

A. By Mr Kellogg.

Q. Well, prior to that time?

A. No, sir: it was not dismantled by Mr. Kellogg.

Q. But by you after the surrender of the property under this lease to this company, was any of the machinery taken away by the owner of the grant?

A. Yes, sir.

Q. That is what I am now referring to; the other is a subsequent matter.

A. When we dismantled it we took out all the parts that were liable to be stolen and took it down to the ranch.

Q. That is to your home ranch?

A. Yes, sir.

Q. That is not far from the initial corner, is it?

A. About two miles, or a mile and a half west.

Q. Near the north side of the grant?

A. Yes, sir.

Q. After the property had thus been surrendered to the owners of the grant and machinery to a certain extent taken away from the mill, did you have any conversation with Mr. Kellogg concerning a lease of this property?

A. I did.

Q. You may state whether or not any lease, verbal or otherwise, was made to him at the time for this property?

A. I gave him a verbal lease for three months, I think in 1887.

Q. When did it expire?

A. In December, 1887.

Q. For the purpose of his occupancy you may state what was done in reference to this milling machinery which you had previously taken away from the premises?

A. Well, after he had worked the mine a little while he wanted to use the mill, and I gave him permission to use it and I hauled parts of the machinery that was at the ranch up to the mill for him. He had it there for something like two months. He promised if I would loan him this machinery he would return it in as
91 good order as I gave it to him. In about two or three months I heard he had left the country and the mill, and everything, and parties were stealing the machinery.

Q. Strangers were stealing the machinery?

A. Strangers, yes, sir.

Q. What did you do then?

A. I sent the men up and dismantled the mill again, and brought what parts could be stolen, or liable to be stolen, back to the home ranch again.

Q. Mr. Adams, you may state whether, after the removal of this property by you, and after the expiration of the verbal lease you had given Mr. Kellogg, he subsequently made an application to you for a lease of this property.

Mr. SMITH: I object to that as incompetent and immaterial.

The COURT: I think he may ask it.

A. He did the following spring.

Q. State whether it was granted or refused.

A. I refused it.

Q. After the refusal of the lease to Mr. Kellogg, you may state whether or not Mr. Kellogg took possession of this property.

A. He did take possession and locked up the mine; and in the meantime the machinery and mill had been burned down.

Q. You may state whether or not that possession which he took after you refused to give him a lease is the possession of which you are now complaining.

A. Yes, sir; which he is now claiming.

Q. You may state in what respect, if any, the occupancy by Mr. Kellogg has interfered with the use of the property and its occupation by the owner of the grant.

A. There was a damage to the cattle interest. It is just at the mouth of the gulch, and our cattle could not get up there within a mile or two of the mouth of the gulch to feed up in the gulch; and then again, they diverted the water, and it was thrown out on the sand and did not return into the stream again; and he cut timber for mining purposes; and going backward and forward over the ground—he seemed to have his own way there.

Q. You may state whether or not the owners of the grant suffered pecuniary damages by reason of this occupancy by Mr. Kellogg.

A. They did; and there was a damage when he encouraged others to take up mines on the grant.

Mr. SMITH: I move to strike that out.

92 Mr. VAILE: Wait a minute; you need not go into that subject at present.

Q. How much in your judgment, was the damage to the owners of the grant from the time of Mr. Kellogg taking possession to the beginning of this suit, by reason of the deprivation of the owners of the grant of the use of the property in connection with cattle grazing?

A. I think during the period there was a damage of four or five thousand dollars at least; we could not occupy that country; could not graze on it; it was a considerable damage to the hay interest where the water was diverted; thrown out into the sand and seeped away; did not go in its natural stream where we could use it from the ditches.

Q. What is your judgment of that damage?

A. It is hard to figure; it was several thousand dollars, for we have not cut any hay on that but once,—last year,—for several years.

Q. Mr. Adams, I understood you to say that you had lived upon this property or in its immediate vicinity since 1869; how long have you been connected with Baca Grant No. 4, either as a tenant, manager or owner, in all those capacities, what period of time will it cover?

A. Since 1874. I was employed from 1870 to 1874 at times there.

Q. That is to say you were an employé at times for that period

from 1870 to 1874, and since that time you have lived upon the ranch?

A. Yes, sir; been lessee, owner and manager.

Q. Your present position is that of manager for Mr. Shaw?

A. Yes, sir.

Q. You have already stated you were at one time the owner under deed from Mr. Gilpin?

A. Yes, sir.

Q. You may state how far back you are familiar with the fact, of the occupancy, if it be a fact, of this property by the owners of the grant.

A. Since 1869.

Q. You may state whether the grant itself has been in continuous occupation of the owners of the grant, personally, or by their employés and tenants from 1869 down to the present time.

A. It has.

Q. Were the outer boundaries of this grant marked in any way by monuments when you first became acquainted with it?

A. They were.

Q. What was the nature of these monuments when you first became acquainted with the grant?

93 A. At each half mile there was a stake set upright, a mound built and a post set.

Q. Over what portion of the outer boundaries of the grant did these monuments exist?

A. Well, on the west and south and the eastern portion of the survey there were stakes and posts, as I have described, and on the north side there were stakes and rocks.

Q. Well, how much of the north part was so marked?

A. The whole of the north line.

Q. The whole of the north line?

A. The whole of the north line marked with rocks.

Q. To the northeast corner?

A. No, as near as surveyed at the time.

Q. How many miles of it?

A. Ten miles.

Q. From the northwest corner ten miles east?

A. Yes, sir.

Q. How much of the east line was so marked and designated in 1869?

A. Four miles.

Q. That is, from the southeasterly corner north?

A. Yes, sir.

Q. And the entire south line?

A. Yes, sir.

Q. And the entire west line?

A. Yes, sir.

Q. You may state whether or not at any time this grant was fenced in?

A. It was.

Q. When was that done?

A. In 1881.
Q. Who built the fence?
A. I did.
Q. How much of the grant was thus fenced?
A. It was fenced from a mile and a half east of the initial corner.
Q. That is in the mountains?
A. That is in the mountains, around to——
Q. (Interrupting.) Around in what direction? Follow the direction.
A. West to the northwest corner, then south to the southwest corner, then east to the southeast corner, then north a little over four miles, a little beyond the thirteen-mile post.
Q. To get into the mountains again?
A. Yes, sir.
Q. The only part then that was not fenced, as I understand you, was the mountainous portion in the northeast corner?
A. Yes, sir.
94 Q. You may state whether or not during the period of your connection with this grant, from 1874 down, the grant has been paying taxes regularly to the State and county.
A. It has.

Mr. SMITH: We object to that, if your honor please, as not material; and a man does not pay taxes verbally.
The COURT: I think he may ask him the question.

Q. Mr. Adams, while you are upon the witness stand, I will call your attention to certain photographs: and first, as these will come in as exhibits I will mark them as Exhibits 15 and 16. Now, I will call your attention to the photograph which is marked Exhibit 15, and will ask you to state what it is.
A. This is a view taken in 1887 of the North Crestone creek, or really the north line of the grant.
Q. You may state whether or not the northeastern portion, the mountainous portion along the northern boundary of the grant, and near the northeast corner, is shown upon that photograph.
A. It is.
Q. Please state whether the rise of the mountains from the adjacent plain is shown in that vicinity.
A. It is; yes, sir.
Q. You may state whether this photograph covers that portion of the line on which the initial corner is situated.
A. Yes, sir.
Q. I see a light pencil-mark drawn upon the photograph; by whom was that drawn?
A. It was drawn by myself.
Q. Please state what you intended it for, this light pencil-mark.
A. To show the north line of the grant from the initial corner, and where the line goes over the summit of the range.
Q. From about what position was the photograph taken?
A. It was taken about seven miles west of the initial corner.

Q. How near the north boundary of the grant was the instrument, can you tell?

A. Just about a mile south of the north line.

Q. You may state when this photograph was taken.

A. In 1866, or 1887; 1886, I think.

Q. Was it taken for any purpose connected with this suit?

A. No, sir; it was taken to help a sale; that is to make out papers for a sale at the time.

Q. Illustrating the grant?

A. Yes, sir.

Whereupon counsel for plaintiff offered in evidence the photograph marked Exhibit 15, which was received without ob-
95 jection; and the same is included in the order of certification hereinafter set out.

Q. Now, I will call your attention to the photograph which I have marked as Exhibit 16, and I will ask you to state what that photograph represents?

Mr. SMITH: If the court please, before counsel proceeds with further examination upon this line, I desire to ask what the purpose of this examination is; if it be to establish or tend to establish the definiteness of the original selection made by Watts in 1862 as containing a definite point of description, I desire to object to it as being immaterial, and to object to all the testimony of this class, for the reason that the construction of that selection is a matter of law for the court, and not a question of fact for the jury. The definiteness of the original description.

The COURT: We will have to regard it as a question of fact for the jury; and in that view the photographs may be used.

A. This represents a view of the home ranch from the south looking north.

Q. Does it also show the relation of the mountains to the valley?

A. It does.

Q. In what direction are those mountains from the immediate vicinity of the grant?

A. They are east: that is, it shows looking east.

Q. Is it not northeast, Mr. Adams?

A. Yes, sir.

Q. In other words, the great bulk of the range as shown here is north of the line of the grant?

A. Yes, north of the line of the grant.

Q. What is the direction in which this view is taken?

A. Looking north, a little northeast.

Q. I will ask you if a line should be drawn east and west through a point a mile north of the grant and parallel to this north boundary, would the place where that line would strike the mountains be shown in this photograph?

A. It would.

Q. It is not marked in any way here?

A. No, sir.

Q. Can you indicate, however, by description in reference to the photograph about where it would strike the mountains?

A. I can.

Q. Where would it be?

A. A little south of the North Crestone cañon, probably a half a mile, or not quite a half a mile south.

96 Q. Then would it be at the right-hand side of the photograph and be halfway between its margin and where the cañon is shown on the photograph?

A. Yes, sir.

Q. Now, Mr. Adams, you have made the expression "home ranch" in your answers; what do you mean by "home ranch"?

A. It is the ranch where we have always lived; there are six or eight camps along on the place—shed camps, cattle camps & so on.

Q. Cattle camps?

A. Yes, sir.

Q. But the home ranch is where the family lives?

A. Where the family lives; where we always have lived.

Q. How long has this home ranch been so occupied?

A. Since I have been there it has been the home ranch.

Q. Since 1869 or 1870?

A. Yes, sir.

Q. Counsel have called attention to the consideration named in the deed from yourself to Mr. Shaw as being one thousand dollars, and other good and valuable considerations. I will ask you to state what was in fact the consideration which moved from Mr. Shaw to yourself?

A. Two hundred and fifty thousand dollars.

Q. What is the ranch used for; this Baca Grant No. 4?

A. Cattle-raising.

Q. Has it always been so used?

A. Yes, sir; cattle and hay.

Q. Where do you get your supply of water?

A. From the creeks; from the streams.

Q. Coming from where?

A. From the Sangre de Cristo range.

Q. From these mountains on the northeast corner?

A. Yes, sir.

Q. Are there various streams entering the range near the northeast corner?

A. Two.

Q. What are they?

A. North and South Crestone and Willow creek is a little further southeast.

Q. All those enter near the northeast corner, do they not?

A. Yes, sir.

Cross-examination.

By Mr. SMITH:

Q. Mr. Adams, you were asked with respect to the surrender of

the lease which was made upon the Eastern Star mine and the Gold Legion; how was that effected?

97 A. How was it turned over?

Q. Yes.

A. They turned over all their stock of the company to Governor Gilpin and turned the machinery and everything else over to me.

Q. Did Governor Gilpin make any further transfer of the property, of the lease, any further assignment of it?

A. He did; he turned over the stock and the company turned over the machinery.

Q. When, if at any time, did you become the owner of the lease?

A. In 1885.

Q. By what kind of an instrument?

A. It was a deed.

Q. Is this deed which has been offered here the only evidence of your title to that interest in the Eastern Star mine?

A. The stock of the Gold Legion Mining Company that has been turned over and assigned to Mr. Shaw, and he has it now.

Q. This deed, however, is the only evidence you have of any kind?

A. Yes, sir.

Q. There never was any formal assignment of that lease to you; who did that lease run to?

A. It ran to the Gold Legion Mining Company.

Q. Who was the other party to the lease?

A. Governor Gilpin.

Q. When, if at any time, did Governor Gilpin ever transfer that lease to you?

A. He never transferred it to me because they threw it up before the deed was completed.

Q. How long have you known the Eastern Star mine?

A. I have known it under different names since they first commenced to mine there.

Q. Who did you first know as being in possession of the Eastern Star mine?

A. Mr. Herard.

Q. When was that?

A. 1877 or 1878; 1877 I think it was.

Q. Was Mr. Herard there in possession with your knowledge and consent; were you then the owner of this grant?

A. No, sir.

Q. Were you in charge of this grant?

A. I was.

Q. Was he there at that time with your permission?

A. No, sir; we warned them all off after we found out where the eastern line was.

Q. What was he doing there in 1878?

98 A. He was not there in 1878; he went there in 1877, and I think he moved off in 1877; he had a ranch and a few cattle, and mining, dairying, &c.

Q. What was he doing in respect to the Eastern Star mine?

A. Occasionally mining it; there was a very little mining done. There was a prospect hole. He was trying to sell it.

Q. He was working on it as a mine; what did he have, a shaft?

A. A shaft, not very deep.

Q. Any tunnels?

A. I think he did towards the last. Mr. Herard gave up the property, turned it over to us when he moved from there; he had no claims on it at all; when he found that he was on the grant, he moved to a point where he supposed he was off the grant, and did not know he was on the grant until 1880, and until I had a surveyor go around and show me the lines and found he was; and then he moved three-quarters of a mile outside the grant.

Q. Are you speaking of the place where he lived or where he was mining?

A. He moved from the mine to get off the grant, did not want anything more to do with it if it was on the grant, and if the mine was claimed by the grant he would throw it up.

Q. He could not sell because you claimed it was on the grant?

A. Yes, sir.

Q. You say it was 1880 before he found he was on the grant?

A. No, sir; he found it out in 1876 and 1877 at Cottonwood, then he moved around to where he supposed he was off the grant, and then he did not find he was on the grant until 1880.

Q. I am only asking you with reference to the mine; it does not matter where he lived; it is not necessary to complicate the matter by telling where Mr. Herard lived at those times; limit yourself to the mine; when did he first find he was on that northeast corner?

A. In 1877, I think.

Q. How did he ascertain that?

A. There was a committee of miners from Cottonwood, and some of my men chained the distance from the west line from some stakes on the west side of the grant to the Sangre de Cristo.

Q. Prior to that time this grant had never been surveyed on that northeast corner?

A. No, sir.

99 Q. There had been two miles left unsurveyed from a point two miles east of the I. C. corner around to six miles above the southeast corner?

A. Yes, sir.

Q. In other words, the entire northeast corner of the grant was open and unsurveyed?

A. Yes, sir.

Q. And these miners, nor anybody else, could tell where that line was?

A. Yes, sir; they could tell, for some of them went down and sighted from stakes to the northeast corner, and they knew that they were two miles or two miles and a half inside of the grant, at Cottonwood in the Sangre de Cristo.

Q. But they had to make some kind of a survey for themselves to find it out; it was not marked on the grant in any way?

A. No, sir.

Q. When did you first know Mr. Kellogg in connection with that property?

A. In 1886, I think it was; 1886 or 1887.

Q. Did he ever at any time have any connection with this lease of the Eastern Star mine as mentioned in your deed?

A. No, sir.

Q. You say you had some talk with him about making him a new lease; was he in possession of the mine or working it at the time you had that conversation?

A. Yes, he had been in possession of it, but threw it up, as I stated awhile ago, and left the machinery and left everything, left the country, claimed he could not make it pay—at least, that is what I understood he said; I did not see anything of him after he left; went away and left the machinery all in the mill, and I had to send men up there and get it back.

Q. Who owned the mill?

A. It belonged to the grant.

Q. When did they buy it?

A. It was turned over through the Gold Legion Company and through a man named De Walt.

Q. Gilpin owned the stock?

A. He owned the stock of the company which was turned over to me, that is when they forfeited their lease.

Q. Did you ever do any mining on this property, on the Eastern Star mine?

A. No, sir.

Q. Was this mill on the mine?

A. No, sir.

Q. How far was it from the mine?

100 A. Well, I do not know exactly where their corner stakes are, but it was just across the creek a little west from the ground they claim; the lines have been changed there several times.

Q. It was not on this 10 acres of ground which is in controversy here?

A. Yes, sir.

Q. You say it was on the ten acres?

A. Yes, sir; that is if you take the mine at the center of the 10 acres.

Q. Upon what part of the mine was it as to its north and south end?

A. It was on the northeast portion of the 10 acres taking the shaft as the center of the 10 acres.

Q. You know where this 10 acres is?

A. Yes, sir.

Q. You did no mining, however?

A. No, sir.

Q. Did you go into the shaft or tunnels?

A. I have been in there several times.

Q. Did you at that time?

A. No, sir.

Q. Did you have any work done?

A. No, sir.

Q. Did you make any investigations to see whether there was a mine there or not?

A. Yes, sir; we panned the ore and had it assayed several times.

Q. Did you at that time?

A. We did in 1879; a lot of those mines were assayed and prospected by Professor Blake of New Haven.

Q. For whom?

A. For the grant.

Q. I understood you to say a moment ago, Mr. Adams, that this mine had been claimed by other parties in other names; who are they?

A. It has been leased to other parties, and under other names.

Q. When?

A. It was leased in 1879 by Governor Gilpin to a man named William Young.

Q. For how long a time did Mr. Young hold it?

A. It was leased to him for 99 years.

Q. For how long a time did he hold it?

A. He never did any work on it that I know of; he threw up the lease.

Q. Was he ever there?

A. He was.

101 Q. Do you know of him doing any work?

A. He did some work.

Q. You say his name was William Young?

A. William Young.

Q. Any one else—you say he did do some work?

A. Yes, sir; some; not very much.

Q. Where did he do any work, do you know?

A. I do not know; I could not tell you what shaft; there are a good many cuts, shafts and tunnels there.

Q. How do you know he did any work?

A. I loaned him forty dollars to get some grub to do some work with.

Q. And you know that he spent it on the work?

A. I do know he worked there a little while.

Q. But you do not know where?

A. He had a lease on three claims there up and down the gulch. I do not know which claim he worked on, whether on the Eastern Star or some other.

Q. Then you are not prepared to testify that William Young did any work on the Eastern Star mine?

A. No, sir; not on that mine; he had it under different names; I think he called it the White Chief or some such a name as that.

Q. Who else did Governor Gilpin ever lease that claim to?

A. He leased to the Gold Legion Mining and Milling Company.

Q. When was that?

A. In February, 1885.

Q. Mr. Adams, when was this northeast corner surveyed?
A. Surveyed two years ago.
Q. In 1892?
A. Yes, sir.
Q. Prior to that time there had never been any surveys of the grant to close it off?
A. No, sir; not for line two miles and a half east of the second mile post, and then down as far as the 13-mile post.
Q. I will ask you if that rough diagram over there on the board approximately shows the correct condition of the exterior lines of that grant?
A. Yes, sir; it does show the exterior line, but it does not correctly show the line of the trend of the range; that runs right across the initial corner.
Q. I think those marks are intended for the creeks?
A. No, sir; this was northeast and southwest, the creeks, but the lines that he has drawn there for the mountains should cross the I. C. corner.
Q. I am only asking with reference to exterior lines; that shows the condition of the exterior lines up to 1892?
102 A. Yes, sir.
Q. And it correctly shows their condition in 1876?
A. Yes, sir.
Q. That little square there just below the word "cottonwood" on the plat, does that approximately show the relative situation of the Eastern Star mine to the lines?
A. No, sir.
Q. Where would you place it?
A. It should be a little further west.
Q. Will you be good enough to mark it approximately relatively to those lines?
A. Here we have a map which is on a scale which gives it exactly; it is a section map.
Q. For the purpose of reference will you be good enough to mark on this map; just make a little mark here, just a little pencil mark.
A. For the mine?
Q. For the ten acres that are claimed for the mine.
A. Well, as I understand he wants the ten acres of which that is the center.
Q. Just you say where the mine is.
A. (Pointing at map.) Well, the mine is about there.
Q. That is just off the piece of platted ground represented on the map?
A. Yes, sir.
Q. About a quarter of a mile?
A. It is not quite so far as that; it is just at the edge of the survey.
Q. Mr. Adams, has this mine ever been fenced in?
A. No, sir.
Q. At any time?

A. No, sir; that is, the grant has been fenced but not the mine itself; it has been locked up.

Q. Well, that there may be no misunderstanding about it, has the entire grant ever been fenced in?

A. No, sir.

Q. Has it ever been so that miners and prospectors going in over the mountains could not go right where this mine was without crossing a fence?

A. They could by going over the range; a pretty hard trip to get over there; I do not think a man could get over without a burro.

Q. Mr. Adams, you stated that you had paid taxes upon this grant?

A. I have.

Q. Have you paid it upon the entire grant as a whole?

A. Yes, sir; I have paid all the taxes since 1877; some $66,000.

103 Redirect examination.

By Mr. VAILE:

Q. Mr. Adams, referring to this map which is entitled Luis Maria Baca Grant No. 4, which we will hereafter offer in evidence, I will ask you to point out on this map the point on this grant to which the fence had been run upon the east side of the grant, if you can tell?

A. Right in a little north of the 13-mile post.

Q. The 13-mile post is marked in small letters on the margin of the map?

A. Yes, sir.

Q. Point it out on the map to what point the fence had been extended on the north boundary of the grant?

A. It is fenced a little over a mile and a half east of the one-mile post—no, a little over a half a mile east of the one-mile post, and a mile and a half east of the initial corner.

Q. To the point where this summit comes up there?

A. Yes, sir; right at the top of that hog back.

Thereupon counsel for the plaintiff offered in evidence th photograph heretofore marked Exhibit 16, and the same is covered by the order of certification hereinafter set out.

Mr. VAILE: If the court please, except for what transpired at the last trial of this case, I should feel that we ought to rest our case at this point, but in view of the opinion expressed by the court upon two propositions—one as to the necessity of some evidence of the approval of the survey at Washington, the other as to the definiteness of description of the initial corner before the expiration of the three years fixed in the proviso of the statute—I feel that it is important for us, before resting this case, to go into evidence upon those two subjects. I would say, however, to the court, that, since the former trial of this case, I have examined the law on this subject very thoroughly, and I feel convinced that the court upon fur-

ther hearing would consider that the survey, as approved by the surveyor general, and upon the evidence already in, is sufficient, and that no additional approval in the Land Department at Washington was necessary. I also feel that the law is clear and explicit to the effect that when the survey is made it is conclusive that the land surveyed is the same as the land selected. In view, however, of the former opinion of the court, and as the matter is not in a shape to call for a discussion of the law again at this time, I will proceed to offer in evidence,—as we can make these matters explicit—certain facts which cover those two points.

Whereupon plaintiff called PETER H. VAN DIEST, who, after being duly sworn, testified as follows:

104 Direct examination.

By Mr. VAILE:

Q. Professor Van Diest, will you state your name to the jury?
A. Peter H. Van Diest.
Q. Are you connected with any official office in the city of Denver?
A. I am.
Q. With what office are you connected?
A. I am chief of the land division in the surveyor general's office.
Q. How long have you been connected with the surveyor general's office for the State of Colorado?
A. Since 1878.
Q. Continuously from 1878 to this time?
A. Yes, sir.
Q. You are familiar with its records and correspondence?
A. I am.

Through this witness, the plaintiff introduced exhibits numbered 17, 18, 19 and 20, heretofore set out in this record; and upon cross-examination of the same witness the defendant offered in evidence Exhibits A, B, C, D, E, and F, heretofore set out in this record; which said last-mentioned exhibits were also offered by the plaintiff in his own behalf.

And before proceeding with the further examination of said witness, the plaintiff, to further maintain the issues on his part, offered other documentary evidence as hereinafter set out.

Counsel for plaintiff offered in evidence two passages from Executive Document No. 1, House of Representatives, 38th Congress, 2nd session, being from the report of the Secretary of the Interior, transmitted by the President with the annual message to Congress; which report transmitting these documents bears date December 5th, 1864. The first offered is from page 24 of the report of the Secretary of the Interior, and that part of the report of the Secretary of the Interior which includes the report of the Commissioner of the General Land Office.

Whereupon, said passage offered in evidence was admitted by copy, which copy was marked Exhibit 21.

EXHIBIT 21.

"In Colorado Territory the returns of surveys for the last fiscal year consist of correction, parallel, township and sectional
105 lines, with fifty miles of private grant embracing over 431,000 acres of public lands. Also, 92,292 acres in the fourth location of the Las (Vejas) grant, as confirmed by the act of 21st June, 1860, to the heirs of Luis Maria Baca, the premises formerly falling within the limits of New Mexico, but now of Colorado."

Report of Secretary of the Interior for 1864, page 24.

Counsel for plaintiff thereupon offered in evidence, from page 95 of the same report of the Secretary of the Interior, document D, which is the report of the surveyor general of Colorado, included in the report to Congress, under date of October 1st, 1864.

Whereupon, said passage was offered in evidence by copy, which copy was marked Exhibit 22.

EXHIBIT 22.

"During the month of November, 1863, Deputy Surveyor A. Z. Sheldon made a survey of Grant No. 4 of the heirs of Luis Maria Baca, as located by William Gilpin, attorney for said heirs, under the act of June 21, 1860. The survey was made under the usual guarantees of its accuracy, and the field-notes returned to this office for approval. Under instructions from the General Land Office dated February 12, 1864, that survey and location were approved, subject to the conditions and restrictions above referred to."

Surveyor General's Report of Oct. 1, 1864, included in Report of Secretary of the Interior for 1864, page 95.

Whereupon, counsel for plaintiff offered in evidence for the purpose of showing the segregation of this grant from the public domain at that time, the map accompanying the report of the Secretary of the Interior for the year 1864, which shows Baca Grant No. 4 as segregated from the public domain, and which is a part of the printed volume above referred to.

Whereupon, said map was received in evidence and marked as Exhibit No. 22½, and is included in the order of certification hereinafter set out.

Thereupon, plaintiff's counsel offered in evidence a map of the State of Colorado, bearing the signature of Joseph Wilson, Commissioner duly certified by the Commissioner of the General Land Office, bearing date October 2nd, 1866, which shows Baca Grant No. 4 segregated from the public domain.

Objected to by counsel for defendant as immaterial, and it has gotten fairly beyond the period of time at which the action
106 of the Government has relation to this grant as a specific thing, and as to its right after that it was dealt with merely as an existing physical fact.

Mr. VAILE: That is an admission that our rights matured at the time we say, which is twelve years before your rights were initiated.

Mr. SMITH: There is no question but what your folks think you own the Baca grant.

Mr. VAILE: It is not what we think, but the action of the Government in the recognition of our right.

Mr. SMITH: I submit that none of these recognitions have an official action after they terminated it; that nothing that the Government did can in any manner bear upon the question whether or not this was mineral land and whether or not it being mineral land it had been taken by the applicant; it merely recognized that a certain piece of ground twelve and a half miles square was claimed as being the Baca grant; that the question at issue here was not before any person in any shape or form, who acted in reference to the condition of that grant after the time when the surveyor general approved it, and that their rights must stand or fall upon the rights which they obtained by the approval of the surveyor general on the 18th of March, 1864.

The COURT: What is the date of this?

Mr. VAILE: The date of this map is 1866.

The COURT: Put it in.

Counsel for defendant thereupon saved an exception to the ruling of the court admitting said map in evidence.

Mr. VAILE: I will simply call the attention of the jury to the fact that this is a map of Colorado made in 1866, bearing the signature of the Commissioner; that the Baca claim is marked on it in square form adjoining the 38th parallel of latitude.

Whereupon, said map was received in evidence and marked as Exhibit 23, and is covered by order of certification hereinafter set out.

Whereupon, counsel for plaintiff offered in evidence a sentence from the report of the Commissioner of the General Land Office for the year 1866, being the report which was accompanied by
107 this map just introduced, and being the printed report of the Commissioner of the General Land Office, at page 104 thereof.

To which counsel for defendant objected for the same reasons as before, that it is a statement made by some officer of the Government long after this approval upon which counsel insists the rights of this claim must rest as a matter of law.

The COURT: Read it.

Whereupon the same was admitted in evidence and marked Exhibit 24.

EXHIBIT 24.

"A small settlement has recently been made near the lake on Baca Float No. 4, belonging to Governor Gilpin."

Surveyor General's Report, August 15, 1866, included in Report of Commissioner of the General Land Office for 1866, page 104.

Whereupon, counsel for plaintiff offered in evidence a transcript certified by the Commissioner of the General Land Office, of a portion of a manuscript map in that office bearing the original signature of Joseph S. Wilson, Commissioner, which covers that portion including Baca Grant No. 4, and shows its segregation from the public domain, bearing date November 5th, 1868.

To which counsel for defendant objected for the reasons last above stated, that it is long after the approval of this survey, and that no inference ought to be drawn supporting rights not given, granted and created by the acts of the proper officers of the Government at the time that this selection was approved, and that the approval when made cannot be extended.

Which objection was by the court overruled

To which ruling of the court counsel for the defendant then and there duly excepted.

Said manuscript was then received in evidence and marked Exhibit 25, and is covered by order of certification hereinafter set out.

Mr. VAILE: If the court please, as the Supreme Court and the Land Office have held by various decisions that the certification of such maps is evidence of the approval by the Land Office of the surveys themselves, I offer in evidence the fact, evidenced by the map I now have in my hand, that on August 26th, 1867, the Commissioner of the General Land Office, over his signature and the
108 seal of his office, certified the plat of Baca grant from his records.

Mr. SMITH: This is a copy of the map already offered.

Mr. VAILE: Yes, sir; it is the date of the certification which is the feature which I wish to bring out; that on August 26th, 1867, the Commissioner of the General Land Office certified from his records a copy of Baca Grant No. 4.

Mr. SMITH: I understand then that the only thing counsel offers is the fact that in August, 1867, the Commissioner of the General Land Office was willing to, and did, issue a certified copy of the plat then in his office, which is already in evidence in this case?

Mr. VAILE: The willingness is a matter of conclusion; the fact that he did is what we are offering.

To which offer counsel for defendant objected as not in any manner tending to extend the legal rights given by the map which is there certified.

Which objection was by the court overruled.

To which ruling of the court the said defendant, by counsel, then and there duly excepted.

And thereupon the certificate attached to a copy of the plat heretofore introduced as Exhibit No. 7, was introduced in evidence as Exhibit No. 25½, and is as follows:

EXHIBIT 25½.

"I hereby certify that the above map is a true copy of the map of Baca Grant No. 4, on file in this office.

JOS. S. WILSON,
Commissioner.

General Land Office, August 26, 1867."

Mr. VAILE: I will say to the court that this map was followed right up from year to year; for instance, for the year 1867 I have an official map made by the Commissioner of the General Land Office, which again shows the segregation of this grant from the public domain, and it has been so carried on successive maps from 1864 right down to date.

Mr. KELLOGG: I have one made last year.

Mr. WOLCOTT: Which is eminently correct.

Counsel for plaintiff then offered in evidence an original letter to John S. Watts, who was one of the holders of this grant,
109 from Joseph Wilson, Commissioner, bearing date January 14th, 1868, declining to issue a patent and giving the reasons therefor.

To which counsel for defendant objected because it appears that at that time said Watts had no interest in said grant, and in any event the action of the Commissioner in declining to issue the patent can in no manner extend nor abridge their rights.

Which objection was by the court overruled.

To which ruling of the court, defendant by counsel then and there duly excepted.

Which letter was received in evidence and marked Exhibit 26, and is as follows:

(EXHIBIT No. 26.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *January* 14, 1868.

Hon. J. S. Watts, present.

SIR: Referring to your application of 12th inst. for the issuing of patent for the tract of land in Colorado known as "Baca Tract No. 4," I have to state that the selection authorized by the 6th section of the act of 21st June, 1860 (Stats. vol. 12, page 72) has been made, and the survey executed and reported to this office, but as no provision is made in the statute for the issuing of patent, the survey and statute are the only authorized evidences of title, this office having no authority to issue patents unless the statute expressly orders the same, which is not done in the Baca case, but "that a grant may be made by a law as well as a patent pursuant to a law is undoubted (6 Cr. 128); a confirmation by a law is as fully to all

intents and purposes a grant, as if it contained in terms a grant *de novo*."

(12 Peters' Reports of the Decisions of the Supreme Court of the United States, page 454.)

Very respectfully, your ob't serv't,

JOS. S. WILSON,
Commissioner.

Counsel for plaintiff next offered in evidence an original letter of Joseph S. Wilson, Commissioner of the General Land Office,
110 to John S. Watts, transmitting certain papers, the papers being the ones already offered in evidence under the certificate of May 4th, 1868, attached to Exhibit No. 6, heretofore set out in this record.

Which offer was objected to as immaterial.

Which objection was by the court overruled.

To which ruling of the court the said defendant, by counsel, then and there duly excepted.

Whereupon said letter was received in evidence, marked Exhibit 27, as follows:

(EXHIBIT No. 27.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *May 4th*, 1868.

Hon. John S. Watts, Washington, D. C.

SIR: In compliance with the request contained in your letter of the 2nd inst., I have the honor to enclose herewith, certified copies of the application of the heirs of Luis Maria Baca to locate claim No. 4 in Colorado, confirmed to them under the act of Congress approved June 21, 1860; a certificate of the surveyor general of Colorado in regard to the character of the land included in said location and a copy of the field-notes of the survey thereof.

In accordance with the provisions of the act of Congress approved July 2nd, 1864, the cost attending the preparation of the aforesaid documents and the certificate is seven dollars, which it is expected you will remit to this office at your earliest convenience, to be paid into the U. S. Treasury.

I have the honor to be, very respectfully, your ob't servant,

JOS. S. WILSON,
Commissioner.

Counsel for plaintiff then offered in evidence a certificate of a list of private claims, including Baca Grant No. 4, bearing date in 1869, from the official report of the Commissioner of the General Land Office, printed in the latter part of 1869.

To which counsel for defendant objected for the reasons before stated; that it is immaterial because merely confirming the
111 fact that the Government had recognized the location of this claim, and approved a survey and plat of it, and in so far as the act would give title the Government had stated that this land

had been selected; but our objection is, and it goes to the root of all these matters, that what was granted, and what was approved by the surveyor general cannot be in any manner extended or increased by any of these subsequent recitals of any officer of the Government after the fact.

Which objection was by the court overruled.

To which ruling of the court the said defendant, by counsel, then and there duly excepted.

Whereupon said certified copy of a list of private claims was received in evidence and marked Exhibit 28, as follows :

(EXHIBIT No. 28.)

"D."
W. H. W.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 7, 1895.

I, Edw. A. Bowers, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of a list of certain private land claims confirmed by Congress, with the designations thereof, names of confirmees, dates of confirmation and area of each claim so far as the same had been ascertained by United States surveys, is a true and literal exemplification of an official statement over the signature of Jos. S. Wilson, Commissioner of the General Land Office, and bearing date of November 1, 1869, and included in the annual report of the aforesaid Commissioner to the Secretary of the Interior, for the year 1869; and that the same appears at page 399 of said official report as the same was originally published, and as reprinted pursuant to certain resolutions of the Senate of the United States, and of the House of Representatives, passed on July 13, 1870, and July 15, 1870, respectively, as set forth in the reissue of the report of 1869, aforesaid.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

EDW. A. BOWERS,
Acting Commissioner of the General Land Office.

112 *Private Land Claims.*

Designation.	Name.	Confirmee.	Under act of—	Area in acres.
1	San Juan Bautista del Ojito del Rio de las Gallinas.	Preston Beck, Jr	June 21, 1860	318,699.72
2	Town of Tomé	Inhabitants of the town	Dec. 22, 1858	121,594.53
3	Tierra Amarilla	Francisco Martinez *et al*	June 21, 1860	Not surveyed.
5*	Town of Casa Colorado	Inhabitants of the town	Dec. 22, 1858	Do.
6*	Brazito	Legal representatives of Juan Antonio Garcia	June 21, 1860	Do.
7	Town of Tecolote	Inhabitants of the town	Dec. 22, 1858	21,636.83
8	Los Frigos	Legal representatives of Francisco Trajillo, Diego Padilla, and Bartolome Marquez.	June 21, 1860	12,545.66

Private Land Claims—Continued.

Designation.	Name.	Confirmee.	Under act of—	Area in acres.
9	Junta de las Rios	John Scolly, Guillermo Smith, Gregario Trajido, Augustin Duran, Santiago Giddings, and Francisco Romero.	June 21, 1860	Not surveyed.
10	Nuestra Senora de la Luz	John Lamy, bishop of New Mexico.	June 21, 1860	16,546.35
11	Town of Chillili	Inhabitants of the town	Dec. 22, 1858	38,435.14
12	Agua Negra	Antonio Sandoval	June 21, 1860	Not surveyed.
13	Town of Belen	Inhabitants of the town	Dec. 22, 1858	194,663.75
14	San Pedro	José Serafin Ramirez	June 21, 1860	35,911.63
15		Charles Beaubien and Gaudalupe Miranda.	June 21, 1860	Not surveyed.
16†		Jose Leandro Perea	June 21, 1860	Do.
18	Canon de Pecas	Legal representatives of Juan Estevan and legal representatives of Francisco Ortiz, Jr., and Juan de Aguilar.		Do.
16	Rancho of the pueblo of San Cristoval.	E. W. Eaton, assignee and legal representative of Domingo Fernandez and others.	June 21, 1860	27,854.06
20	Town of Las Vegas	Inhabitants of the town	June 21, 1860	496,446.96
1‡	Location No. 1	Heirs of Luis Maria Cabeza de Baca, in lieu of "Las Vegas Grandes."	June 21, 1860	Not surveyed.
1‡	Location No. 2	Do.	June 21, 1860	99,239.39
21	Town of Tajique	Inhabitants of the town	June 21, 1860	Not surveyed.
22	Town of Torreon	Do.	June 21, 1860	Do.
23	Town of Manzano	Do.	June 21, 1860	Do.
24	San Isidro	Legal representatives of Antonio Armenta and Salvador Sandoval.	June 21, 1860	Do.
25	Town of Cañon de San Diego.	Inhabitants of the town	June 21, 1860	Do.
27	Town of Las Trampas	Do.	June 21, 1860	Do.
113				
28		Legal representatives of Sebastian Martin.	June 21, 1860	Do.
29	Town of Anton Chico	Inhabitants of the town	June 21, 1860	389,662.72
30	Rancho of Pagnate, rancho of El Rito, Giganto Cañon, and rancho of San Juan and Santa Ana.	Indians of the pueblo of Laguna	June 21, 1860	Not surveyed.
31		Legal representatives of Vicente Duran y Armijo.	June 21, 1860	Do.
32	Town of Mora	Inhabitants of the town	June 21, 1860	Do.
33	Valverde and Fray Cristoval.	Heirs of Pedro Armendares	June 21, 1860	Do.
34		Do.	June 21, 1860	Do.
35	Bosque del Apache	Antonio Sandoval	June 21, 1860	Do.
36	Town of Chamito	Inhabitants of the town	June 21, 1860	Do.
37	Town of Tejon	Do.	June 21, 1860	Do.
38		Legal representatives of Pedro Sanchez.	June 21, 1860	Do.
43	Ortiz mine	Elisha Whittlesey, Abraham Renchor, Ferdinand W. Risque, Nathaniel M. Miller, Joseph F. Walker's representatives, Charles E. Sherman, and Andrew J. O'Bannon.	Mar. 1, 1861	69,458.43
70	Cañon del Agua	Jose Serafin Ramirez	June 12, 1866	3,501.21

* The claim of Casa Colorado is numbered 29 in the act of confirmation, but in the corrected list of private claims (see letter of surveyor general of January 12, 1858,) it is numbered as above.

† The claim of E. W. Eaton is numbered 16 in the act of confirmation, but should have been numbered 19. It seems to have been accidentally omitted in the corrected list.

‡ The heirs of Luis Maria Cabeza de Baca, by the act of June 21, 1860, were granted, in lieu of "Las Vegas Grandes," which they claimed, the same amount of land contained in the Las Vegas town grant, to be located by them in square bodies, not exceeding five in number. The heirs of Baca have located said grant in five square bodies, viz: Nos. 1 and 2 in New Mexico, Nos. 3 and 5 in Arizona, and No. 4 in Colorado.

JOS. S. WILSON,
Commissioner.

Department of the Interior, General Land Office, November 1, 1869.

Thereupon it was stipulated by and between plaintiff and defendant that the map of the United States printed with the report
114 of the Commissioner of the General Land Office for the year 1869, shows a segregation of Baca Grant No. 4 from the public domain; subject to the same objection before stated. Also stipulated that the map of Colorado printed with the report of the Commissioner of the General Land Office for the year 1876, which brings it down to the date of defendant's claim, shows Luis Maria Baca Grant No. 4, segregated from the public domain, and its relation to public surveys, subject to the objection of its irrelevancy and incompetency as before.

Plaintiff's counsel thereupon resumed the examination of the witness, as follows:

Q. Mr. Van Diest, have you brought with you the original field notes of the survey of fractional township 43, north of range 11, east New Mexico principal meridian?

A. I have.

Q. When was that survey made?

A. The south boundary of township 43, north, range 11, east, along the north boundary of Baca grant was surveyed August 27th, 1873, and the east boundary of that township was surveyed August 28th and 29th, 1873.

Q. You may state whether there were any earlier surveys of the public land adjacent to Baca grant,—were these the first surveys adjacent to Baca grant?

A. Those were the first surveys.

Q. I will ask you to turn to the lines run along the south boundary line of that township and show what references in it are made to boundaries or monuments of Baca Grant No. 4; is the south (boundd*a*ry) of this fractional township coincident with north line of Baca Grant No. 4?

A. It is.

Q. I want you to read only that portion which, following along the north boundary of the township, shows the connection of the public surveys thus made with the previous public survey of the Baca grant.

A. (Witness read as follows:) Beginning at the southwest corner of this fractional township, I run east — along the south boundary of section 7, 23 chains, 81 links, to corner No. 43 in Baca Grant survey.

Q. To corner No. 43 in Baca Grant survey?

A. Yes, sir.

Q. Then passing on does it go on the south boundary of section 8?

A. Yes, along south boundary of section 8, 23 chains, 70 links, to corner No. 44, Baca grant.

Q. And running along south line of section 9?

A. The connection was made from the southwest corner of said section to corner 45 in Baca Grant survey, 23 chains and 68 links.

115 Q. Section 10?

A. From the southwest corner of said section to corner number 46 of Baca Grant survey, 24 chains and 45 links.

Q. And in section 11?

A. 24 chains, 46 links, to corner 47 in Baca Grant survey.

Q. Section 12?

A. In section 12, 24 chains, 60 links, to corner No. 48 of Baca Grant survey.

Q. I will ask you to state whether all of the southern tier of sections in that fractional township 43 north, 11 east, are tied to and connected with corners of Baca grant shown by the Sheldon survey?

A. They are.

Q. You may state whether the surveys you were reading from are official surveys made by the Government of the United States?

A. They are original field-notes as taken by the surveyor who made the contract with the Government to survey these lands, and which were approved and accepted as the official field-notes by the Government.

Q. That carries you through the tier of sections; now, if you please, you may turn to the subdivisional lines of the township lying east, and which lies north of that part of the Baca grant on which the initial corner is found, in township 43 north, range 12 east. What I wish to ask you there is in reference to the description of the character of land; what is the first section that is taken up there, and what is the first line running east?

A. This tract and the notes thereof, as surveyed, started with the survey along the south boundary of fractional township 43 north, range 12 east.

Q. Won't you state what is the character of the land as shown by the official field-notes for the south boundary of section 7, being along the north boundary of Baca grant, in this fractional township?

A. The statement is that the land is rolling, soil second rate, on south boundary of section 7.

Q. I will ask you to state what is said in those field-notes of the survey of section 8, in the same township, as to the character of the land along the south boundary line?

A. Last half mile broken, suitable only for grazing.

Q. In the next mile or two of that, what is the character of the southern boundary?

A. "Land extremely rough and rocky. From the rocky nature of the mountains I find it impossible to extend the survey of this line further east."

116 Q. Do you know from investigations you have made where the initial corner of the Baca grant is in reference to these sections, as to whether it is on the south boundary of one of them, and which one?

A. Yes, sir.

Q. On which section is it?

A. It must be on the south boundary of section 8.

Q. From the field-notes, Mr. Van Diest, will you please show the character of the country on a line running north from Baca grant between sections 8 and 7 in this township?

Mr. SMITH: You are commencing west of the initial corner?

Mr. VAILE: Running north; the purpose is to find, in the immediate vicinity, the character of the land.

A. The land broken and hilly.

Q. I will ask you to state whether in following that line there are any mountains spoken of?

A. At 46 chains north of the southwest corner is the foot of a mountain, and at 54 chains from that same point the top of a sharp ridge bearing northwest and southwest.

Q. Won't you turn to the account of the character of the land on the north line of section 6, from the Creston creek, east?

A. East half mile very mountainous.

Q. Won't you turn to the east line of section 8, which is about three-quarters of a mile east of the initial corner, running north; what is the description of that land?

A. That is between eight and nine.

Q. Yes, sir, between 8 and 9.

A. "Land nothing but rocks."

Q. I think that is sufficient from these field-notes. But won't you go west—take the south boundary of section 12 in township 43 north, range 11 east, which is also on the north boundary of the Baca grant, and commences a little over a mile west of the initial corner?

A. Land level; soil, first half mile, first rate; last half, second rate. Good grazing the last 12 chains.

Q. That is going east, is it?

A. Yes; in other words, soil of the second rate is right down at the corner next to the range line.

Q. Professor Van Diest, have you, from the official notes of the surveyor general's office, made up a sketch or plat upon which is marked the character of the land, as shown by the field-notes, for the part of the country we have just been speaking of?

A. I have.

Q. Is this the map (handing witness a map)?

A. It is.

117 Q. Did you prepare it?

A. I prepared it.

Q. Is it correct from the field-notes?

A. I have followed the field-notes correctly.

Q. Have you also marked upon it from the field-notes of the Sheldon survey of the Baca grant the description of the land at the corresponding positions?

A. I have.

Q. And it correctly represents it?

A. It does.

Whereupon said map was offered in evidence by counsel for the

plaintiffs, and marked Exhibit No. 29, and is included in the order of certifications hereinafter set out.

Mr. SMITH: Professor, in making up this map you have also made use of the field-notes of the Sheldon survey?

A. Yes, sir.

Q. Going east from the initial corner, Professor, is there any other official survey of that line than the Sheldon survey at present in your office?

A. There is.

Q. For what township and range and sections?

A. Oh, east of the initial corner?

Q. Yes, sir.

A. Not in connection with the public surveys now, but the line has been extended.

Q. Then the only field-notes to which you have had access going east from the initial corner are the field-notes of the Sheldon survey and of the Darby survey?

A. No, there is one mile of the township, this survey of township 43 north, range 12 east.

Q. Which you have already given?

A. Yes.

Q. And east of that mile is the Darby and Sheldon surveys?

A. Yes, sir.

Q. The Darby survey was made for the purpose of establishing the northeast corner of the Baca grant?

A. Yes, sir; in the northeast corner.

Q. Then the land lying immediately north of the Baca grant, after you get a mile east of the initial corner, has never been sectioned by the Government?

A. For about a mile.

Mr. VAILE:

Q. Does it not run something over a mile; how far is that from this line (pointing on map)?

A. Nearly a mile and three-quarters. This was sectionized,
118 including section 10 and section 3, but the line here was not extended; the line between sections 3 and 10 was extended.

Q. The official Government survey of the adjacent township to Baca grant, made in 1873, was surveyed east of the initial corner along the line of the boundary of the grant for a mile and almost three-quarters?

A. Was made for a mile and almost three-quarters east of the initial corner.

Q. And that is shown upon the map you have made?

A. Yes, sir.

Cross-examination.

By Mr. SMITH:

Q. Professor, has your attention been called by counsel to all of the letters with reference to this survey and plat which was approved

March 18th, 1864, between the surveyor general of Colorado Territory and the Commissioner of the General Land Office?

A. You mean by Mr. Vaile?

Q. Yes.

A. No, he has not asked for all the letters.

Q. You have the record there of the other correspondence between your office and the office at Washington?

A. I have.

Thereupon counsel for defendant introduced certain letters hereinbefore set out in this record, being Exhibits A, B, C, D, E and F.

After the production of said letters, and the introduction of the same in evidence, the cross-examination of the witness continued, as follows:

Mr. SMITH:

Q. Professor, can you quickly turn to that portion of the field-notes where the surveyor stated that it was impossible to proceed further east, or can you identify that point?

Mr. VAILE: Are you referring to Baca Grant or township surveys?

Mr. SMITH: The township surveys.

Q. Can you identify the point on the map? If you can do that you need not turn to it. Where is it relatively from the initial corner?

A. The southeast corner of the section 9; from this point here (indicating) it is not possible to go any further from here.

119 Q. The termination of the Sheldon survey and the termination of the survey north of it reach the same point then going east?

A. The Sheldon goes a little further; here is the initial corner (indicating); here is mile number one, and mile number 2 has been set, the second mile corner has been set by Sheldon about 30 to 40 chains easterly of this point, the southeast corner of section 9.

Q. By the Government survey of 1873?

A. Yes, sir.

Q. The southeast corner of section nine is the point where the surveyor then said he could not extend further east?

A. Yes, sir.

Q. And at the same point Mr. Sheldon did, as a matter of fact, proceed to set another mile post beyond that going east?

A. Yes, sir.

Q. Now, will you be good enough to refer precisely to the original field-notes that you have in your hand which states that, so that there may be no misunderstanding about it?

A. At the end of the south boundary of section 9, after the surveyor came to the southeast corner of section 9, he states the ground to be "extremely rocky, and from the rough nature of the mountains, I find it impossible to extend the survey of this line further east," probably to take a whole section more in.

Q. That is a mile and a half east of the initial corner?

A. Very nearly.

Mr. VAILE: A mile and three-quarters?
Mr. SMITH: A mile and three-quarters, yes.

Q. Professor, have you ever been upon this grant?
A. No, sir.
Q. Or over that line?
A. No, I never have been.
Q. Do you know, Professor, from the records in your office, just where the 38th parallel of north latitude crosses that range?
A. We cannot determine it exactly, only by reference to points east and west where the observation has been made.
Q. I asked you if you knew where the 38th parallel crosses the range, from the records of your office?
A. I can only estimate.
Q. Do you know whether or not this initial corner upon the north line of the Baca grant is upon the 38th parallel?
A. According to the Sheldon survey it is exactly upon it.
Q. Do you know from all the records of your office, whether or not the initial corner is upon the 38th parallel?
120 A. From our fractional township lines up to the corner the line is a little south of the 30th parallel.
Q. How many times, so far as you know, within your knowledge has the exact location of the 38th parallel been ascertained by official surveys made under the direction of the Government?

Objected to as not proper cross-examination, and not a matter of legitimate evidence.
The COURT: I do not think it is cross-examination.

Redirect examination.

By Mr. VAILE:

Q. Do you know how long Mr. Case was surveyor general of Colorado?
A. I believe two years.
Q. He was the first surveyor general of the Territory?
A. Yes, sir; he was the first, from 1861 until some time in 1862 or 1863, when General Pierce was his successor.
Q. Do you know how long Pierce was surveyor general?
A. About four years, not full four years.

Mr. VAILE: If the court please, when I introduced Mr. Van Diest in connection with this correspondence, it was for the purpose of bringing forward specially, among other things, certain letters of which I did not have certified copies. There are a great many letters of which I have certified copies from the Commissioner of the General Land Office, which I expected at some proper stage in this case to introduce upon our behalf, including most of those that counsel brought out in the cross-examination of Professor Van Diest. Of course, it is unnecessary to duplicate the record, and I will ask to have these several letters which counsel offered in evidence in behalf of the defendant in the cross-examination of Professor Van Diest introduced as exhibits on behalf of the plaintiff.

Now, if the court please, following that I offer in evidence a certified copy of a letter. By way of introduction of this letter, if the court please, I will state that after the application for patent by Watts, which was declined by the letter of January 14th, 1868, already offered in evidence, a slight change of phraseology in the law induced Governor Gilpin to go personally to Washington and apply for a patent again. This resulted in an official communication of date March 21st, 1879, from the Commissioner of the General Land Office to the surveyor general of Colorado, which I now offer in evidence.

Which offer was objected to by counsel for the defendant
121 as being immaterial, as many years elapsed after the occurrences upon which the plaintiff's title rested, and it was after the filing of our location, even after our possession of this mining claim, as shown by the evidence introduced here on the part of the plaintiff, and as not tending to pass any title to mineral land by virtue of this grant.

Which objection was by the court overruled.

To which ruling of the court counsel for defendant then and there duly excepted.

Whereupon said certified copy was received in evidence and marked Exhibit No. 30, and is as follows:

(EXHIBIT No. 30.)

"D." DEPARTMENT OF THE INTERIOR, G. B. E.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *M'ch 21st*, 1879.

Mr. Wm. L. Campbell, surveyor gen'l of Colorado.

SIR: I have considered the application of Hon. Wm. Gilpin for a patent to the tract of land known as Baca Claim No. 4, in Colorado.

Section six of the act of Congress approved June 21, 1860, provided that the heirs of Luis Maria Baca might select a quantity of land equal to that claimed by the town of Las Vegas, to be located on vacant non-mineral land in New Mexico, in square bodies not to exceed five in number, the same when selected by the heirs to be surveyed and located by the surveyor general of New Mexico.

It was subsequently ascertained that the quantity of land claimed by the town of Las Vegas, and therefore the amount to be selected by the Baca heirs, was 496,446.96 acres.

In 1863, the Baca heirs selected the tract of land now in question. This was the fourth tract, three having been previously selected, and therefore this tract was designated as Baca Claim No. 4. It contains 99,289.39 acres being one-fifth of the amount granted to said heirs.

Thus was at the time of its selection in the Territory of Colorado; but at the date of the act making the grant June 21, 1860, the tract
was a part of the Territory of New Mexico.

122 After the selection of this tract it was surveyed and located by the surveyor general of Colorado, he having first determined that the land was vacant and non-mineral.

The seventeenth section of the act of Congress, approved Feb. 28, 1861, gave the surveyor general of Colorado the same authority concerning the location of this tract as was originally conferred on the surveyor general of New Mexico.

After the selection, but previous to the location, the Commissioner of the General Land Office instructed the surveyor general of Colorado that as the statute did not authorize the issuing of a patent, the act of June 21, 1860, and the plat approved by the surveyor general would constitute the evidence of title.

There is no doubt that Government may convey and vest the legal title without issuing a patent as effectually as may be done by patent. Larriviere *v.* Madegan, 1 Dillon, 455; Gregnon *v.* Aster, 2 Howard, 319; 3 Opinions of Att'y Gen., 350.

The surveyor general was authorized by the act to locate only vacant non-mineral land. Unless the contrary appeared, it would be presumed from the act of locating that the surveyor general determined the land was not mineral. But before locating, the surveyor general had expressly found and certified that this land was not mineral.

It is now alleged that the land is mineral; that the surveyor general approved the plat of survey "subject to the conditions and provisions of section six of the act of Congress, approved June 21, 1860," and that therefore the grantees cannot hold the land under that act.

The conditions and provisions of the act of June 21, 1860, were as respects this question, that the selection and location should be on land determined at the time of such location, when the title passed, to be non-mineral land.

The act did not intend that if at any subsequent time in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as any one might choose to allege its mineral character.

The surveyor general did not undertake, and had no power, to impose conditions not in the act.

If after fifteen years the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years? If the question may be re-
123 opened as to the land granted under the provisions of the act of June 21, 1860, why may it not as to land acquired under the homestead, pre-emption and other acts of Congress? Would such titles ever be considered secure?

The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals; this office has no authority to reopen the question; the land cannot longer be regarded as a part of the public domain.

Mr. Gilpin, who claims this tract of land as the assignee of the Baca heirs, makes personal application for a patent. It is not claimed that the granting act authorized a patent to issue, but that it is authorized by section two of the act approved March 3, 1869.

(15 Stat., 342) and by sec. 2447 Rev. Stat. U. S. But those provisions authorize patent to issue only when claims to land have been confirmed by law; that is, where an act of Congress recognizes a claim to specific land, and does not apply to cases where the acts of Congress only authorize a claim to be made thereafter to land without regard to any specific tract or parcel of land. This office can issue patents only where it is authorized by some act of Congress. The application of Mr. Gilpin for a patent must therefore be refused.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 27th day of April, 1894.

Whereupon counsel for plaintiff, in order to show the continued recognition of this decision by the department as its determination upon the subject, next offered in evidence a letter bearing date June 28th, 1884, upon the same subject, by N. C. McFarland, who was then the Commissioner of the General Land Office, addressed to W. Neil Dennison, Canon City, Colorado.

To which offer counsel for defendant objected for the reasons last above stated in relation to the Williamson letter, and all letters and papers since the approval of the plat.

Which objection was by the court overruled.

To which ruling of the court said defendant, by counsel, then and there duly excepted.

124 Whereupon said letter was received in evidence and marked Exhibit 31, and is as follows:

(EXHIBIT No. 31.)

"D." DEPARTMENT OF THE INTERIOR, W. H. W.
GENERAL LAND OFFICE, J. R. D.
WASHINGTON, D. C., *June 28th*, 1884.

W. Neil Dennison, Esq., Canon City, Colorado.

SIR: I have received, by performance from the department, your letter of June 12th inst. addressed to the Hon. Secretary of the Interior, relating to the Baca location, No. 4, ("Gilpin grant,") in which you inquire 1st if said grant is located on mineral or non-mineral land; and 2nd, if prospectors will be allowed to hold any mineral discoveries made on said No. 4, prior to the year 1880.

In reply to said inquiries, I have to say, that by the 6th section of the act of June 21, 1860, (12 Stat., 71) the heirs of Baca were authorized to select the quantity of land awarded to them, in not more than five square bodies, upon vacant, non-mineral land; and it was made the duty of the surveyor general to make survey and location of the land selected, of course subject to the conditions imposed as to the character of the land awarded.

In the case of location No. 4, in question, the surveyor general having first ascertained and determined that the land selected was vacant and non-mineral, surveyed and located it, and approved the

plat of the location, March 18, 1864, and this approved plat, in the absence of any provision of law for the issuing of patent, became the evidence of title in the owner of the land so located.

On a subsequent application by Gov. Gilpin for a patent, it was contended, before this office, that mineral existed in some part of the location, and therefore the grantee could not hold the land under the act. The matter was fully considered and the following conclusions reached:

"The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined, at the time of such location, when title passed, and to be non-mineral.

"The act did not intend that if at any subsequent time, in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as one might choose to allege its mineral character.

"The surveyor general did not undertake, and had no power to impose conditions not in the act.

"The question as to the mineral or non-mineral character of the land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals, and this office has no authority to reopen the question; the land can no longer be regarded as a part of the public domain."

You will see by the foregoing that the land in question was determined, in 1864, by the surveyor general, whose province and duty it was, to be non-mineral; the location was then perfected and the title passed. Whether prospectors will be allowed to hold any mineral discoveries thereon, prior to or since 1880, must probably rest between them and the holders of the location No. 4.

Respectfully, N. C. McFARLAND,
Commissioner.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 27th day of April, 1894

Mr. VAILE: I offer one more letter of like nature, and that I think closes this character of evidence. It is dated June 8th, 1889, addressed to John Duncan and Co., Westcliffs, Colorado.

Which said letter was received in evidence and marked Exhibit Number 32, and is as follows:

(EXHIBIT No. 32.)

"D." DEPARTMENT OF THE INTERIOR, W. O. C.
GENERAL LAND OFFICE, W. H. W.
WASHINGTON, D. C., *June* 8, 1889.

Jno. Duncan & Co., Westcliffs, Colo.

GENTLEMEN: I am in receipt, by reference, of your letter dated the 18th ult., addressed to the Hon. Secretary of the Interior, in re-

gard to mines and minerals within the surveyed limits of
126 "Baca Claim No. 4," commonly known as the "Gilpin grant."

In reply I have to say, that by the 6th section of the act of Congress approved June 21, 1860, the Baca heirs were permitted to select a quantity of land equal to that claimed by the town of Las Vegas, to be located on vacant, non-mineral land in New Mexico, in square bodies not to exceed five in number; the same when selected by the heirs, to be located and surveyed by the surveyor general of New Mexico.

It was subsequently determined that each of said tracts should contain 99,289.39 acres; the one-fifth part of the area claimed by the town of Las Vegas.

In the year 1863 said heirs selected the tract in question, three other tracts having been previously selected.

At the time of its selection this tract was in Colorado, but at the date of the act (June 21, 1860) the tract was in the Territory of New Mexico.

Thereafter, Mr. Gilpin,—who claimed the land as the assignee of the Baca heirs,—applied for a patent, which was denied him; for the reason that there was no provision of law for the issuance of patents on these locations.

Mr. Gilpin was, however, given an approved plat of the official survey, of this tract number 4, as evidence of title, in connection with the act of Congress aforesaid, and his purchase from the heirs.

In determining the various questions involved in the case, this office on March 21, 1879, decided that the character of the land involved had already been determined, and the matter therefore, was *res adjudicata*.

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals. This office has no authority to reopen the question. The land can no longer be regarded as a part of the public domain," &c.

The case has, therefore become final so far as this office is concerned; and unless authorized to do so by some superior authority, I cannot recognize entries, or filings, as established by the approved survey thereof.

Very respectfully, W. M. STONE,
Acting Commissioner.

Certified by the Commissioner of the General Land Office, under the seal of said office, the 27th day of April, 1894.

127 Mr. VAILE: If the court please, in view of the fact that the actual survey on the ground had not been made for the mountainous portion of the northeast corner, and there were questions with settlers as to just where that line was on the grant, a "completion survey," as it was called, was made in 1892; I first offer in connection with that the instructions given by the Government to the surveyor for the Darby survey.

Counsel for defendant objected to all the evidence pertaining to the Darby survey, which was made in 1892, for the purpose of closing up this gap.

Mr. VAILE: For the purpose of marking on the ground the lines.

Mr. SMITH: The objection is that this Darby survey took place in 1892, and was made long after the inception of our rights, such as they were, a matter in which we had no control or part in any manner, and it cannot operate to extend or affect in any manner the extent or character of the grant which may have been made by the Government prior to that time.

Mr. VAILE: I do not propose to offer anything but the instructions and a little in relation — the northerly boundary, to show the nature of the land.

Whereupon counsel for plaintiff read the portions of said instructions offered, and the same were then received in evidence and marked Exhibit No. 33, and are as follows:

(EXHIBIT No. 33.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
DISTRICT OF COLORADO, DENVER, COL., *Oct.* 18, '92.

Special instructions to Thos. L. Darby for the completion of the survey of the north and east boundaries of the Luis Maria Baca Grant No. 4, in Saguache county, Colorado.

SIR: You are hereby detailed for the special work of protracting the east and north boundaries of the grant, so as to locate and mark on the ground, the northeast corner of said grant, and the portions of the east and north boundaries left unsurveyed by A. Z. Sheldon, in October, 1863.

Copy of the notes of the survey of the grant and of the east boundary of t'p 41 N., R. 12 E., also a diagram showing in
128 black lines what is surveyed, and in red lines what needs to be surveyed, accompany these instructions.

You will begin with identifying the locus of the southeast corner of the grant. If any doubt exists as to its true position, or if the corner is missing, you can re-establish its true locus by retracing the east boundary of t'p 41 N., R. 12 E., which line appears to have been carefully run and closed upon the south boundary of the grant 1.58 chains west of said S. E. corner of the grant.

Thence from said point, retrace the east boundary from southeast corner to the 13th mile post, set by Sheldon, 4 miles 7.12 chains north of said S. E. corner, and where corners are missing, re-establish them.

Thence from the last identified corner on said east boundary, run meridian line by chaining, when possible, and by triangulation when chaining is impossible or impracticable for close work.

Set ½-mile and mile corners, when such corners can be perma-

nently placed and besides, build on the line in gulches and on prominent mountain ridges, monuments alongside a stone set in ground or mound marked E. B. B. G. and give in your notes, the distance of such monuments to nearest set mile or half-mile corner.

Proceed in this manner until you have extended the east boundary for eight miles, 29.32 chains northerly of the locus of the 13th mile post of the Sheldon survey.

Thence identify the locus of the initial corner of the grant set by Sheldon on north boundary of grant and retrace the north boundary easterly to the 2nd mile post as set by Sheldon.

Thence from the last identified corner on said north boundary east of initial corner, run a parallel marking said line on the ground by ½-mile and mile corners until you intersect the extended east boundary and place at the point of intersection on a corner marked for northeast corner of grant.

In case the true locus for northeast corner is inaccessible or falls on a precipitous side of the Crestone mountains, or in a deep gorge, place and mark witness corners for northeast corner of grant as near its locus as possible on the north boundary as well as on the east boundary line of the grant.

If the surveyed portion of the boundary lines by Sheldon have been run and chained correctly, as I have every reason to
129 admit, you will find the point of intersection at 2 miles 35.45 chains east of the locus of the 2nd mile post east of initial corner set by Sheldon.

This would make the grant a square of 13′ 39½″ extent in longitude and 10′ 50¼″ extent in latitude at a mean latitude of 37° 54′ 36″, containing 154.9446 square miles or 1.306 square miles less than 100,000 acres.

If for that reason you find the distance from the initial corner to the point of intersection for northeast corner less than 4 miles, 33.93 chains, move the corner set for N. E. corner to that distance east of initial corner and correct your east boundary line by moving the corners and monuments on a true line between finally located N. E. corner and S. E. corner of grant.

If you find, however, said distance longer than 4 miles, 33.93 chains, you need not correct the east boundary unless it exceeds 12 chains said length of 4 miles, 33.93 chains, because an excess of 12 chains on north boundary would make up the difference between 156.25 square miles and 154.94 square miles.

Make field-notes of your survey in the usual form, and not omit a single detail necessary to make these notes complete and full.

The work requires great care, and where chaining can be executed, a double set of chainmen. The retracing and re-establishing of described portions of the north and east boundaries and the extending of the portions of said boundaries not yet established is assimilated with standard lines for which is allowed by law, a rate of $9 per mile, and when mountainous, heavily timbered, or covered with dense undergrowth, $13 per mile. You will be paid at these rates, but your account must not exceed $225.

The liability of this work will be charged to the apportionment

to Colorado, of the appropriation for public surveys, for the fiscal year ending June 30, 1893.

Respectfully,

E. C. HUMPHREY,
Surveyor General.

Thereupon counsel for plaintiff offered in evidence the plat of the completion survey, which was received in evidence and marked Exhibit No. 34, and is included in the order of certification hereinafter set out.

Counsel for plaintiff next offered certain portions of the field-notes of the survey which was made pursuant to these instructions,
130 at page 29 of the certified copy of the field-notes, for the description of the land east of the initial corner, in the Darby notes.

Mr. VAILE: For the first mile east of initial corner.

(Reading:) "Pits impracticable, ground frozen, ground rugged and rocky." For the second mile east of the initial corner description of the land "mountainous and rocky, excepting the little park which contains from 40 to 50 acres, which was probably once the bed of a lake formed by glaciers, timbers, spruce, pine and aspen." At the end of the next mile, "impossible to take any witnesses; offsets were made to avoid bluffs, and very heavy slide rock." That is the end of the third mile east of the initial corner, which is probably far enough for the present purposes of these field-notes.

If the court please, there is a statute of the United States which makes a part of every contract for the survey of public lands, or did during this period, a manual issued by the Commissioner of the General Land Office, bearing date February 22nd, 1855, so that it becomes a part of the statutes of the United States, and I want to offer a portion of that manual.

By the act of Congress of May 30th, 1862, which was nearly a year after this grant was made, I mean after the act of Congress under which our rights are claimed. The act reads as follows: "The printed manual of instructions relating to public surveys, prepared at the General Land Office and bearing date February 22nd, 1855, the instructions of the Commissioner of the General Land Office, and the special instructions of the surveyor general, when not in conflict with said printed manual, or the instructions of said Commissioner, shall be taken and deemed to be a part of every contract for surveying the public lands of the United States. (12 Stats., p. 409.)

Under that I offer certified copy of the manual referred to of February 22nd, 1855, certified by the Commissioner of the General Land Office, for the purpose of showing the form of certification required for surveys, and by negative testimony that it does not require any approval by the Commissioner in form.

I suggest to counsel and the court that this book may be considered as an original exhibit, not be copied into the record, that it may be certified up as an original exhibit.

The COURT: I suppose so; read the part that you want to put into the record, and it is not necessary to put in both.

Mr. VAILE: I wish to read from page 25 of the manual, page 69, and then the certificate on diagram B.

131 Mr. SMITH: If the court please, so far as the act which counsel reads, making a part of the statutes, I do not understand that is the effect given to them at all; it is especially required, it is part of the contract. I concede, however, they may be of interest, as showing the rules under which these surveyors acted, inasmuch as there is no conflict about what was done, or about the survey. The serious objection I have to them is the incumbering of the record with so many maps and plats.

Mr. VAILE: I am very sorry it is necessary, but I want to make it complete while I am at it.

The COURT: Put it in, sir.

Whereupon counsel for plaintiff offered in evidence from the said manual issued by the surveyor general under date of February 22nd, 1855, certain passages and forms of certificates, which were admitted in evidence and marked Exhibit No. 35, and are as follows:

(EXHIBIT No. 35.)

"The original field books, each bearing the written approval of the surveyor general, are to be substantially bound into volumes of suitable size, and retained in the surveyor general's office, and certified transcripts of such field books (to be of foolscap size) are to be prepared, and forwarded from time to time to the General Land Office."

(Page 25.)

"To each of the original field books the surveyor general will append his official approval, according to the following form, or so varied as to suit the facts in the case.

SURVEYOR'S OFFICE AT ——, ——, 18—.

The foregoing field-notes of the survey of (here describe the survey) executed by Robert Acres, under his contract of the — day of ——, 18—, in the month of ——, 18—, having been critically examined, the necessary corrections and explanations made, the said field-notes, and the surveys they describe, are hereby approved.

A. B.,
Surveyor General."

(Page 69.)

"The above map of township No. —, — meridian ——, is
132 strictly conformable to the field-notes of the survey thereof on file in this office, which have been examined and approved.

Surveyor general's office at ——, ——, 18—,

—— ——, *Sur'r Gen'l.*"

(Diagram B.)

Further to maintain the issues on his part, the plaintiff introduced oral testimony as follows:

ALBINUS Z. SHELDON, a witness produced on behalf of the plaintiff, testified as follows, after being duly sworn:

Direct examination.

By Mr. VAILE:

Q. Mr. Sheldon, state your name to the jury.
A. Albinus Z. Sheldon.
Q. Where do you live, Mr. Sheldon?
A. I live in El Paso county.
Q. Mr. Sheldon, what is your age?
A. I am 69 years old.
Q. Mr. Sheldon, have you been, during much of your life, following the business of surveying, or civil engineering?
A. Some 30 odd years I have been engaged in the business.
Q. Are you the Albinus Z. Sheldon who made an official survey of Baca Grant No. 4, in the autumn of 1863?
A. I am; yes, sir.
Q. Mr. Sheldon, were there any public surveys extended over the country prior to your going into it for the purpose of this survey?
A. I think not, sir; I was not aware that there was.
Q. Was the country much inhabited, or was it otherwise?
A. Otherwise.
Q. The call for the description of the ground which you were to survey, the selection of lands as to starting point, reads substantially in this way: Commencing at the eastern edge of the valley of San Luis at a point where the 38th parallel of latitude crosses the base of the snowy range dividing the waters of the Arkansas and the Del Norte rivers. Was this substantially your recollection of the reading?
A. That is my recollection.
Q. Mr. Sheldon, did you study the country and the locality of the 38th parallel of latitude, and where the range of mountains reaches the valley, before establishing the initial point?
133 A. Quite faithfully, sir.
Q. After a study of that country, Mr. Sheldon, I will ask you to state whether or not it was practicable, the country being as it was, for a competent surveyor to find on the 38th parallel of latitude the point on the eastern edge of the valley where that parallel crossed the base of the range?
A. I do not think it was a serious difficulty.
Q. You think, then, it would be practicable to find it?
A. I do; yes, sir.
Q. Did you find it?
A. I satisfied myself.
Q. Did you locate the initial corner of this grant at the eastern edge of the valley at the base of the range, and on the 38th parallel?
A. What I consider to be the base of the range.
Q. You may state whether, in your judgment as a surveyor, any

other competent surveyor with the same call, could from the topography of the country as it exists there, find the point also?

Objected to by counsel for defendant as not material.

The COURT: I do not think you can ask that.

To which ruling of the court counsel for plaintiff then and there duly excepted.

Q. You may state, Mr. Sheldon, what general considerations, as you now remember it, determined your action in fixing the initial corner at the place you did?

A. The general consideration, that is, the general conformation of the surface of the country and the trend of the mountains. I would say further, that in the neighborhood of the 38th parallel the mountains rise very abruptly, and it occurred to me it was a matter of very little difficulty to approximate the base of the mountains at that point.

Q. Do you think that any other point on the 38th parallel, east or west of the point as selected, would be as accurate a location of the call as the point you selected?

Objected to by counsel for defendant.

Which objection was by the court overruled.

To which ruling of the court, said defendant by counsel then and there duly excepted.

A. I do not.

Q. Considering the general trend of the mountain range in that locality, you may state whether the 38th parallel of latitude, which you had to follow, would ascend the range diagonally or at right angles to its trend?

134 A. Well, according to my recollection—it must be remembered it is some thirty-two years ago,—as we followed the 38th parallel we crossed a spur or ridge running down from the mountain, running southwesterly, and from the initial corner we would ascend that spur; if that is a satisfactory answer.

Q. Then the line of steepest ascent from the initial corner, would that be along the 38th parallel of latitude, or would it be in a diagonal course from the initial corner?

A. It would be northeasterly.

Q. After establishing the point where the initial corner, in your judgment, as a surveyor, should be, did you mark and designate it in some way?

A. Yes, sir; I marked it "I. C." upon a certain monument there.

Q. A stone monument?

A. Yes, sir.

Q. You marked it "I. C." for initial corner?

A. Yes, sir.

Q. You may state whether you marked witness trees in any way if you remember now?

A. It is impossible now for me to remember, if I did not mention witness trees in my field-notes I did not mark them.

Q. But you did establish a monument?

A. I established a monument.

Q. Your field-notes show that you went easterly some little distance through a country which you describe in your field-notes as mountainous and rocky, did you establish some monuments for each mile, and every half mile, as far as you extended east?

A. Every half mile as far as I extended, except at the close of the line where we were obstructed by the inaccessibility of the mountains; I think we marked a large rock there.

Q. That already existed?

A. In position.

Q. And after having gone up into the mountains, and found, as your field-notes show, that it was inacces ible, you returned to the initial corner and went westerly along the north corner of the grant?

A. Yes, sir.

Q. You may state whether at that time, 1863, you marked that north boundary with monuments from the initial corner westward?

A. I did.

Q. Every half mile?

A. Every half mile.

Q. And so continued around the grant?

A. Yes, sir.

135 Q. Did you mark the entire west side by monuments?

A. Yes, sir.

Q. And the entire south side?

A. Yes, sir.

Q. And the east side from the southwest corner to the mountains or up into the mountains?

A. To the point where we abandoned the work on account of the severity of the winter.

Q. Was the mountainous country at that time covered with snow?

A. Yes, sir.

Q. Do you remember at any time in any subsequent years being on the grant, and seeing the initial corner again?

A. I am not prepared to swear positively about that; I know I was on the grant and visited several points, but my recollection does not serve me as to whether I visited the initial corner.

Cross examination.

By Mr. SMITH:

Q. Mr. Sheldon, how far east from the initial corner was your camp, where you first camped before starting upon your survey?

A. According to my recollection it was west of the initial corner.

Q. How far west?

A. I cannot answer that, sir; I think my field-notes will show very closely where I camped; I commenced going north of my camp before establishing the north line of the grant, and from that I set the initial corner of the survey; I don't remember.

Q. Do you recall what the character of the surface was as to timber about the initial corner, in the neighborhood of the initial corner?

A. Well, I really can't answer the question at the present time; it occurs to me there was scattering timber about there; I don't remember so as to answer definitely.

Q. Do you remember whether the initial corner was set near a stream or not?

A. I think it was not far from a small stream.

Q. Was it in a level piece of ground or upon the side of a hill?

A. It is my impression that it is a little above the level piece of ground, I could not say how far. Of course those little details are very difficult to recall after thirty-two years.

Q. Undoubtedly. Do you remember whether or not you went north or northeast from the initial corner, at all?

136 A. The line which we were running ran due east, it was intended to run due east.

Q. Do you remember whether while you were there you investigated the country to the north and northeast of the initial corner?

A. Yes, sir, I remember that I went over the ground on both sides.

Q. For how far a distance?

A. I suppose I was on the north side a mile north of the initial corner, perhaps more; and I also went south to some extent. I don't recall how much. My object in doing that was to obtain the general trend of the base of the mountains.

Q. You were endeavoring to ascertain where the base of the mountains was?

A. Satisfactorily to myself, yes, sir.

Q. Was there, or was there not a marked and distinct change in the character of the surface at the point where you placed the initial corner?

A. I think at the point where I made the corner, that the rise commenced increasing a little more abruptly than it had been doing before reaching the initial corner.

Q. Was there any change in the character of the timber or vegetation at that point, or near it?

A. I am unable to answer that question, sir.

Q. At whose request and direction did you make that survey, Mr. Sheldon, if you remember?

A. I made the survey under instructions from the surveyor general. Governor Gilpin brought the instructions from Denver to me at Colorado City; he had signed them himself and I also signed them, and duplicate copies also, and having signed the papers I proceeded under those instructions.

Q. Did you have any conversation with ex-Governor Gilpin with respect to investigating the mineral or non-mineral character of that land?

Mr. VAILE: I submit to the court whether that is cross-examination; we have not had any question about conversations.

The COURT: I do not think you can ask for conversations.

Q. Was Governor Gilpin with you when you made this survey?
A. He was.
Q. Upon the grant?
A. Yes, sir.
Q. Did he assist you, or take any part in the determination of where this initial corner was to be?
A. Not the slightest, except that he acted as flagman.
Q. You determined that from your own observations and study?
137 A. I determined that from my own judgment, sir.
Q. How large an area of territory did you personally examine in determining where the base of the snowy range was upon the 38th parallel?
A. Why, I should say I traversed the grant line north and south in the neighborhood of a mile and three-quarters, perhaps more than that; I know I was north of the initial corner and was south of it. Of course I can't say, it is simply an estimate, I didn't measure the distance.
Q. Now, Mr. Sheldon, will you state to the jury what special and controlling feature there was, if any, which caused you to determine that this particular point was the base of the snowy range?
A. Well, the leading feature was the general trend of the base of the mountains; that was the leading feature at that special point; the apparent increase in the rise of the ground was a secondary one, but the general trend of the base of the mountains, which is very easily determined I apprehend there, was the controlling point that we had in establishing the point.
Q. What do you mean by the "general trend of the base of the mountains," Mr. Sheldon?
A. I mean that course which would be traversed by any line marking the base of the range. Part of my instructions was to give the bearing of that trend; I think that is included in my field-notes. It was desirable to get that as accurately as possible.
Q. In your field-notes you report that the trend of the mountains is north 32 degrees west.
A. Yes.
Q. By that you mean the general course of the range, do you not?
A. I mean the general course of the base of the range. I was not on the summit of the mountain, and therefore cannot determine the trend of the summit.
Q. Now, Mr. Sheldon, will you please state to the jury what you consider the base of the mountain; what it was that you found?

Mr. VAILE: That is hardly a pertinent question in this connection; it was the base of the range, and not the mountain.
Mr. SMITH: I will change it to the base of the range.

A. Well, I should answer generally in this way: The mountains are constituted mainly of rock, and with a pitch downward into the

adjoining country, and that point at the base of the mountains where that pitched would naturally be the bottom of the
138 mountains, what I consider the base; of course there may be deposits, glacial deposits perhaps, running further out; these mountains are destitute of foot-hills as you find them in this neighborhood; the mountains stand out quite boldly next to the valley, and from my opinion of that, it is a matter of very little difficulty to determine quite approximately what the base of the mountains is at that point.

Q. Can you state what the grade, what the fall of the mile of ground east of the initial corner was?

A. No, sir.

Q. Have you any recollection about it?

A. No, sir, I have not. I made no estimates of the grades while I was there, merely an estimate of the eye, a general observation of the surface.

Mr. Z. T. DUVAL, a witness produced on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

By Mr. VAILE:

Q. Mr. Duval, please state your full name to the court and jury.

A. Z. T. Duval.

Q. Where do you live, Mr. Duval?

A. In Denver.

Q. What is your business?

A. Civil engineer.

Q. How long have you been in the business of a civil engineer?

A. About nineteen years.

Q. Have you been in the constant practice of your profession for about that length of time?

A. Yes, sir.

Q. Have you had occasion recently to examine the country in the vicinity of the point that is marked as the initial corner of Baca Grant No. 4?

A. Yes, sir.

Q. When did you make an examination of that vicinity?

A. On the 9th, 10th, and 11th of this month.

Q. You were there then, three days, thus engaged in this examination, were you?

A. Yes, sir.

Q. Who were with you?

A. Mr. Darby.

Q. Is Mr. Darby also a civil engineer?

A. Yes, sir.

Q. And did you go there to make this examination?

A. Yes, sir, a general survey of the ground.

139 Q. I will ask you to state whether in making this examination you went over any lines for the purpose of taking levels, and with a view of making profiles of the lines you traversed?

A. Yes, sir.

Q. Did you establish levels upon the north boundary of the Baca grant east and west of the initial corner?

A. Yes, sir.

Q. I call your attention to a plat which we shall have occasion to use for another purpose in a few minutes, and will call — Exhibit 36; I will ask you to state, assuming that the initial corner is the place marked "initial corner" upon this plat, and that the top of the plat is north, and the right hand east, I will ask you if the line A A would represent the north boundary of the ground that you traversed?

A. Yes, sir.

Q For about what distance west of the initial corner did you take levels upon that line?

A. Two miles.

Q. For about how far east of the initial corner did you take levels?

A. Something over a mile.

Q. I call your attention to the line marked B B on this plat; will you state what that line B B is?

A. A diagonal line running through the initial corner; it is what we designate as a diagonal line through the initial corner.

Q. State what was the reason for selecting that line as a line of profile.

A. To show the slope of the ground each side of the initial corner.

Q. You may state whether or not it shows the course of steepest ascent to the mountains, the shortest ascent to the mountains from the initial corner.

A. It does.

Q. The mountains being in what direction from the initial corner along that line?

A. Northeast.

Q. And as that line goes southwest into what sort of country does it open up?

A. It gets flatter as it goes to the southwest.

Q. Did you take other profiles, and other lines?

A. Yes, sir; a mile north of that.

Q. The line marked on this plat "D D"?

A. Yes, sir.

Q. Was that line parallel with the north boundary of Baca grant?

A. Yes; one mile distant.

140 Q. At what point did you commence your profile upon that line, taking the western terminus?

A. This point is one mile north of the 48-mile post, and 16.62 chains east of the 48-mile post.

Q. And you found that was practically a quarter corner section?

A. Yes, sir.

Q. From there did you take the profile easterly?

A. Yes, sir.

Q. How far easterly were the profiles taken, about?

A. Something over a mile east.

Q. From that line did you take any profile in a diagonal course for any distance?

A. Yes, sir, at station 51.

Q. Which is marked upon this map point "E"?

A. Yes, sir.

Q. I see a line marked "E E", on this map. Is that the course of that other profile?

A. Yes, sir.

Q. How far did you go in taking levels on that?

A. I got pretty near 800 feet.

Q. In the direction indicated by the line on the plat?

A. Yes, sir.

Q. I will ask you to state whether at any of these places vertical angles were taken for the slope of the mountain?

A. Yes, sir.

Q. Did you take any other line of profile?

A. One mile south of the north boundary.

Q. Was that line of profile parallel with the north boundary of the grant?

A. Yes, sir.

Q. Line marked on the plat "C C"?

A. Yes, sir.

Q. About what place did you commence for the west terminus of that profile, in a general way?

A. In the center of section 5.

Q. Well, it is between the 49-mile post and the initial corner?

A. Yes, sir.

Q. And about a mile south?

A. Yes, sir.

Q. How far east did you run that?

A. A mile and three-quarters, I think it was.

Q. I will ask you to state whether this plat, which we will designate as Exhibit 36, I observe that it locates certain creeks; I will ask if they are correctly located where they cross the lines that you took?

A. Yes, sir.

141 Q. For instance, Trois Tetons, or South Crestone creek, crosses the Baca Grant north line some distance east of the initial corner, does it not?

A. Yes, sir.

Q. The North Crestone creek crosses the Baca Grant line something over a mile west of the initial corner?

A. Yes, sir.

Q. There is a creek, I see, which your mile south strikes in its course easterly; what is that creek?

A. Willow creek.

Q. Willow creek; and the mile north at the station 51, or close to it seems to cross a creek; is that the North Crestone creek?

A. Yes, sir, that is the North Crestone creek.

Q. Have you made profiles to illustrate the levels along these lines of observation?

A. Yes, sir.

Q. Mr. Duval, in making profiles for the purpose of determining elevations on the earth's surface for long distances, is it customary to make them on the same scale for the vertical as for the horizontal, or differently?

A. A little different.

Q. And for what purpose?

A. To show up the inequalities of the surface.

Q. Which it would not do on the natural scale?

A. No, sir.

Q. I call your attention to a map, or profile, which we will mark Exhibit 37; on the lower part of this I see a profile marked "natural scale," and then, "one inch represents 400 feet." That is upon a scale where the vertical and the horizontal are both upon the same scale, is it?

A. Yes, sir.

Q. What does that line represent upon that natural scale?

A. It represents the north parallel of this Baca grant.

Q. I see above it, separated from it, a yellow tinted line. What does that represent?

A. That is the diagonal line through the initial corner.

Q. Is that also made on the natural scale?

A. Yes, sir.

Q. Same scale vertical as horizontal?

A. Except this point (indicating) is raised up.

Q. It is put on there separately?

A. Yes, sir.

Q. And from one end to the other it represents the natural scale, does it?

A. Yes, sir.

Q. I see besides upon this exhibit two others. I will ask you to state what they are; first that which is tinted in brown?

142 A. That is the north boundary of the Baca grant.

Q. What is the scale upon which that is made?

A. That is 400 feet horizontal, and 125 feet vertical to the inch.

Q. In other words, it is magnified so as to show the inequalities and changes in the surface?

A. Yes, sir.

Q. What is the other, yellow, tinted line at the upper part of this map?

A. That is the diagonal line through the initial corner.

Q. Is that magnified in the same way on the same scale?

A. On the same scale, yes, sir.

Q. Mr. Duval, taking the diagonal line you made in this upper sketch, does it use the same base, the same datum plane of elevation, that the east and west line on the north line of Baca grant uses?

A. Yes, sir.

Q. So that they are drawn to represent the relative elevation of the one line in relation to the other?

A. Yes, sir.

Q. Where do they touch?
A. At the initial corner.
Q. As they go eastwardly which line rises the more rapidly?
A. The diagonal line rises the more rapidly.
Q. As they go westwardly which line falls the more rapidly?
A. The north boundary line.
Q. Where is the point on the diagonal line of greatest flattening?
A. Down here, westerly.
Q. Where is it in reference to the initial corner; is it east or west of the initial corner?
A. It is west of the initial corner.
Q. I will ask you to state if it is not almost at the initial corner?
A. It is a distance away from it 100 feet.
Q. This is accurately drawn upon the scale which it purports to have, is it not?
A. Yes, sir.

Whereupon plaintiff's counsel offered in evidence said map marked "Exhibit 37," and the same was received, and is covered by the order of certification hereinafter set out.

Q. I see upon this are marked certain altitudes. Are those absolute altitudes above sea-level, or assumed altitudes?
143 A. Assumed altitudes.
Q. What was the altitude assumed for the datum level?
A. 7,800.
Q. 7,800 feet at the 48th mile post?
A. Yes, sir.
Q. And from there the altitudes are given from that basis?
A. Yes, sir.
Q. And the distances by stations of a thousand feet, are they?
A. Yes, sir; horizontal.
Q. I will ask you if you have made profiles in a simi-ar way of the various lines upon which you took the levels?
A. Yes, sir.
Q. I call your attention to Exhibit 38, and ask you whether upon that the same profiles for the Baca grant through the initial corner north boundary and the diagonal line, are shown?
A. Yes, sir.
Q. You may state whether the profile for the line one mile south is shown?
A. Yes, it is.
Q. And at Willow creek?
A. Yes, sir.
Q. I will ask you whether the profile for the line one mile north is shown?
A. Yes, sir.
Q. I see, however, two lines which form the eastern part of that rising upwardly rapidly. What was the occasion of the two lines?
A. That where they commenced there shows the slope of the mountain, from the end of the line we run, by vertical angles.

Q. The one marked east is the vertical angle on the direct line you were traversing?

A. Yes, sir.

Q. And the one marked north 30 degrees, 20 minutes east; what is that?

A. An angle taken from the east line, showing the slope of the mountain.

Q. An angle from the east line was it?

A. Yes, sir.

Q. I see north of that some yellow tinted lines, do they represent in a similar way the slope of the mountain?

A. Yes, sir.

Q. Where were they taken, state on Exhibit 36 where those are taken?

144 A. The angle starts from station 51 and runs 800 feet northeast, and then the angles are taken there which are represented here (pointing on the map).

Q. Are these upon the scale which they purport to have?

A. I think they are.

Q. You have them marked upon these, the actual scale to the inch, both horizontal and vertical?

A. Yes, sir.

Whereupon counsel for plaintiff offered in evidence said map marked Exhibit 38, and the same is covered by the order of certification hereinafter set out.

Q. Mr. Duval, I want to ask you about some other features of this matter (calls attention to a (past-board) model of this mountainous country referred to) have you examined this model which I produce before you?

A. Yes, sir.

Q. Please state whether the various lines of card-board do or do not represent the lines of profile which you took?

Objection by counsel for defendant, that the witness should state the lines of profile.

Mr. VAILE: I speak of them in general.

Mr. SMITH: Whether these represent it actually or exaggerated

Mr. VAILE: This model purports to show the horizontal 660 feet to the inch, and the vertical scale 200 feet to the inch.

Q. I will ask you whether you have checked it over to see whether or not, on that scale, it fairly represents the country, according to the observations which you made upon the ground?

A. It does.

Q. Upon taking this model I find that a line stretched from Willow creek to station 51 crosses through the initial corner; I will ask you to state whether from your observation of the base of the range that fairly or correctly represents the trend of the base of the range for those two miles and more?

A. It does.

Q. State whether at Willow creek the ascent is rapid or gradual, the slope of the mountain from Willow creek?

Objected to by counsel for defendant as immaterial. That is considerable over a mile and a half from the initial corner.

The COURT: He can answer; he is getting at the general line.

145 A. I think it does correctly represent it.

Q. And at Willow creek does the mountain rise abruptly from the creek?

A. Eastwardly it does.

Q. At station 51, you may state whether there is any sudden change of grade on the east side of Crestone creek?

Mr. SMITH: What do you mean by station 51?

Mr. VAILE: He has already located station 51.

Mr. SMITH: A station fixed by himself?

Mr. VAILE: Certainly. It is on this line a mile north of Baca grant, and just on the eastern bank of Crestone creek on the line running parallel with the north line of Baca grant.

Q. You may state whether in that vicinity there is a sudden rise?

A. There is.

Q. I will ask you to state whether at the end of the point 800 feet northeasterly from station 51 there is any sudden abrupt ascent of the mountains?

A. There is.

Q. Now, have you with you the notes, your notes of the levels which you took?

A. Yes, sir.

Q. First, before asking you for them, I will ask you to state in a general way whether the Baca Grant north boundary ascends the mountains in their steepest course, or ascends them diagonally?

A. Ascends them diagonally.

Q. You numbered your stations as you went along?

A. Yes, sir.

Q. What is your station at the initial corner?

A. 105, plus 80 feet.

Q. By your notes each station was 100 feet from the preceeding one?

A. Yes, sir.

Q. So it would mean 10,500 feet plus 80, from your starting point, is that right?

A. Yes, sir.

Q. Upon your profiles I call your attention to the part immediately west of the initial corner and on the brown outline, which you have stated marks the north boundary of the grant. I will ask you to state whether right at the initial corner, just west of it, between that and station 105, in the 80 feet there, there is any sudden change?

A. There is.

Q. Is it correctly marked upon this profile?

146 A. Yes, sir.

Q. Within the 80 feet that separates station 105 from the initial corner is it?

A. It is; yes, sir.

Q. Mr. Duval, from your notes I wish you would state what the average fall per hundred feet is, west of the initial corner, for the first thousand feet. From station 105 westwardly for a thousand feet what is the average fall per hundred feet?

A. It is eight feet.

Q. What is it for the second thousand feet taken by itself?

A. West?

Q. West from the initial corner.

A. It is eight feet.

Q. What is it for the third thousand feet taken by itself, west from the initial corner?

A. $8\frac{2}{10}$.

Q. Then for the three thousand feet from station 105, which is within 80 feet of the initial corner, there is a regular steady slope of eight feet in a hundred, is there?

A. Westwardly; yes, sir.

Q. What is it when it gets out into the prairie, do you remember?

A. No, sir.

Q. Well, take it at mile post 49, in that vicinity, take the next thousand feet.

A. $4\frac{4}{10}$.

Q. Four and four-tenths at that 49-mile post?

A. Yes, sir.

Q. The fall is still to the west, is it?

A. Yes, sir.

Q. Now, Mr. Duval, for the first thousand feet east of the initial corner what is the rise along this line which, as you say, ascends the range diagonally, for the first thousand feet from the initial corner, what is the rise per hundred feet? I am not speaking of the diagonal line, but right along the Baca Grant line.

A. $8\frac{3}{10}$.

Q. What is it for the second thousand east?

A. $10\frac{1}{10}$ feet.

Q. What is it for the third thousand?

A. $14\frac{2}{10}$ feet.

Q. From there on, the mountain ascends quite rapidly, does it not, Mr. Duval?

A. Yes, sir.

Q. Now, Mr. Duval, taking the diagonal line we have mentioned which cuts through the initial corner in the steepest course of the mountain, I will ask you to state what the average fall is for

147 the 400 feet towards the valley; that is, from the initial corner measured upon that diagonal line for the first 400 feet southwest from station zero to station 4?

A. $30\frac{1}{10}$, the total fall.

Q. What I want is the fall per hundred in those four hundred feet?

A. 7½ feet.

Q. What is the rise in the first four hundred feet going northeast, according to the notes of yourself and Mr. Darby?

A. It is 408 feet to this first station northeast. The rise is $40\frac{3}{10}$.

Q. For the four hundred feet?

A. Yes, sir.

Q. How much is that per hundred?

A. $10\frac{1}{10}$.

Q. Then from the initial point southwesterly for 400 feet the fall is what?

A. 7½.

Q. From the same point northeasterly the rise is $10\frac{1}{10}$ feet in a hundred?

A. Yes, sir.

Q. How far does the rise of about 10 feet in a hundred continue on that line, approximately?

A. I cannot tell except by my profile (looks at profile)—about a thousand feet.

Q. From there, from the end of that thousand feet, what is the rise per hundred feet along the next three or four hundred feet?

A. In the next three hundred and sixty-six feet it rises 88 feet.

Q. How much is that per hundred? Does it rise about 24 feet in a hundred?

A. Yes, sir.

Q. Rises 24 feet in a hundred from there up?

A. Yes, sir.

Q. You may state whether the mountain rises abruptly from that portion of the country?

A. It does.

Mr. SMITH: I desire to ask counsel what portion of the country he referred to in that question?

Mr. VAILE: I had already stated; he has taken us to a point a thousand feet northeast of the initial corner, and from there the grade is 24 feet to the hundred, and further on the mountain rises abruptly.

148 Q. In taking your profile for the mile north of the initial corner, you may state what sort of a country it is you traversed before you reached Crestone creek in going eastwardly upon your line of profile, being on the line D D upon Exhibit 36?

A. As to the slope?

Q. Yes; the general country.

A. It had a uniform slope from the quarter corner until it reached the Crestone creek.

Q. Does this model fairly represent the contour of the surface for that distance upon the line D D west of the Crestone creek?

A. Yes, sir.

Q. At station 51 you took a course diagonally for eight hundred feet?

A. Yes, sir.

Q. That is along a road, is it not?

A. Yes, sir.

Q. That is along a road at the side of the creek, is it not?

A. Yes, sir.

Q. What is the rise for that 800 feet, or the rise per hundred feet for the 800 feet from station 51, the northeast 800 feet?

A. It is $51\frac{2}{10}$ feet.

Q. In the 800 feet?

A. Yes, sir.

Q. Making a rise of about how much per hundred feet along the road there?

A. Something over 10 feet.

Q. Exactly?

A. No; not exactly.

Q. I will ask you to state whether at that place there is an abrupt rise in the mountains?

A. There is.

Q. You may state whether the model fairly represents, at the point marked "E" at the end of the 800-foot line, the abrupt rise of the mountain at that place?

A. It does.

Q. Mr. Duval, in the neighborhood of the initial corner where the diagonal line is drawn, what is there, if anything, in the nature of any ridge of the mountain coming down to this point?

A. There is a ridge coming down from the northeast.

Q. Is that upon the line which I now indicate, which is the line B B upon the model?

A. Yes, sir; it is.

Q. From you- examination of this country at the vicinity of the initial corner, the country a mile south of it, the country a mile north of it, and the country east and west of it, and northeast and southwest of the initial corner, I will ask you to state whether,

149 in your opinion as an engineer, or whether you, as an engineer going upon that land with this sort of a call, could locate your point of starting; that is, assuming for the purpose of my question that the north boundary of the Baca grant is on the 38th parallel of latitude, east and west?

A. Yes, sir.

Q. Commencing at a point on the eastern edge of the San Luis valley where the 38th parallel of latitude crosses the base of the snowy range dividing the waters of the Arkansas and Del Norte rivers, with your knowledge now of the ground, could you as a surveyor, locate that point?

A. Yes, sir.

Q. Where would you, as a surveyor, locate it with reference to the point which is now claimed as the initial corner?

A. I should have located it there.

Cross-examination.

By Mr. SMITH:

Q. Mr. Duval, you went there at the request of the plaintiff and their counsel, I presume, to make this survey?

A. I did, yes, sir.

Q. Was the initial corner pointed out to you?

A. Yes, sir.

Q. This model to which your attention has been called, Mr. Duval, of card-board, did you prepare it?

A. No, sir.

Q. Do you know upon what scale it shows the altitude?

A. Yes, sir.

Q. What scale is it?

A. 200 feet vertical and 660 feet horizontal. I simply checked it over after it was made.

Q. Is it the same scale which is shown upon the plat which you have here?

A. No, sir.

Q. What is that scale as compared with it?

A. That is 125 feet vertical and 400 horizontal.

Q. Which is the greater, that or this; which is the farther departure from the true scale?

A. That is over here (points to model).

Q. How much more does that depart from the true scale than this exaggerated line does?

A. This is the true scale, and this other is the exaggerated scale.

Q. Now, I understand you, Mr. Duval, that this scale along here represents the true contour of the surface of the ground along the north line of Baca grant?

A. Yes, sir.

150 Q. And that this point here marked "initial corner" is the initial corner of the grant?

A. Yes, sir.

Q. Have you made an estimate of what the rise is in the first mile?

A. West?

Q. East. In the first 1,000 feet there is a rise of eight feet in a hundred?

A. Yes, sir.

Q. And in the second thousand feet a rise of $8\frac{3}{10}$ feet going east?

A. Yes, sir.

Q. Are those the figures which you gave?

A. The first thousand feet is $8\frac{3}{10}$.

Q. Just state in respect to the second thousand.

A. It is $11\frac{1}{10}$ feet.

Q. These little black squares in this plat, what do they represent in feet?

A. 100 feet horizontally and 20 feet vertically.

Q. I am speaking now wholly of the natural scale.

A. I think it represents a hundred feet each way of the natural scale.

Q. Now, can you tell us, Mr. Duval, what the total rise is in the first mile east of the initial corner?

A. $678\frac{1}{10}$ feet rise.

Q. How much further did you carry your estimates of elevation?

A. Just taking the slope of the mountain there?

Q. No, in this plat.

A. Yes, sir.

Q. Another half mile?

A. Something like that.

Q. Then, at a point a mile east of the initial corner this rise shown upon the plat here commences, does it not?

A. Yes, sir; that is a vertical angle there, 20 degrees and 22 minutes.

Q. That is the first abrupt rise you come to going east from the initial corner?

A. Yes, sir.

Q. A mile and a little over distant from the initial corner?

A. Yes, sir.

Q. West of the initial corner you stated that the grade for the first one thousand feet was eight feet to the hundred?

A. Yes, sir; eight feet.

Q. And for the next one $8\frac{2}{10}$?

A. No, 8 feet; the third was $8\frac{2}{10}$.

Q. And for the entire mile from the initial corner west, the first mile west, what is the grade and the fall?

A. 408 feet.

151 By Mr. VAILE:

—. How much east?

A. 678 feet.

Q. Now with reference to this diagonal line, I understood you to say that this diagonal line was taken upon the steepest profile crossing the initial corner?

A. Yes, sir.

Q. Over what area of country did you pursue your investigations in order to find where the steepest profile was?

A. Just turned the instrument towards the steepest slope that presented itself.

Q. At the nearest point?

A. At the nearest point.

Q. How far is it from the initial corner?

A. That is on the top of the mountain that point is, we simply took a vertical angle from this point.

Q. And this profile of the diagonal line marked upon this map is not intended to be drawn to the horizontal scale?

A. Yes, it is drawn to the true scale.

Q. It shows the profile correctly, as I understand you?

A. Yes, sir.

Q. It also shows the elevation as you proceeded upon that line?

A. We simply took the vertical line at the top of the mountain, at this point shows the slope of the mountain.

Q. This profile of the diagonal line shown in this plat correctly shows the contour of the ground upon the surface, and is the steepest line you could find passing through the initial corner?

A. Yes, sir.

Q. Now what is the elevation upon the diagonal line for the first thousand feet northeast from the initial corner? The first thousand feet, counsel asked you with respect to the first four hundred feet?

A. Ninety-five feet rise in a thousand feet.

Q. Going up the steepest thousand feet you could find with your instrument?

A. Yes, sir.

Q. What is the fall for the first thousand feet upon the diagonal line west from the initial corner?

A. Upon the southwest it would be,—it would be $71\frac{3}{10}$ feet.

Q. How far do you go northeast upon the diagonal line, the steepest line, before you come to this abrupt rise that you speak of?

152 A. 1,659 feet.

Q. Did you not speak of a rise which was 80 feet or thereabouts from the initial corner? You spoke of an abrupt rise of 40 feet.

A. I should state east upon the diagonal line.

Mr. VAILE: That is on the Baca grant line west of the initial corner.

Q. Is there or not any abrupt rise upon the diagonal line within the first three or four hundred feet from the initial corner?

A. No, sir.

Q. The first abrupt rise you come to going up the steepest line of ascent in 1,659 feet from the initial corner?

A. Yes, sir.

Q. And what is that rise; how much does that depart from the general contour?

A. $204\frac{5}{10}$ feet.

Q. Is there within 80 feet of the I. C. corner any abrupt rise to which your attention was directed which you discovered?

A. Yes, just east of it.

Q. How far east?

A. Within the eighty feet of that slope there.

Q. Upon what line?

A. It was on the north boundary line of the Baca grant.

Q. On this line (indicating on the map)?

A. Yes, sir. It shows plainer on the model.

Q. The natural scale is not large enough to show it?

A. No sir.

Q. Then of the 678 feet of rise in the first mile you get 40 feet of it within 80 or 100 feet of the I. C. corner?

A. No sir; that rise is on the other side of the I. C.

Q. The 80-feet rise. You said awhile ago in answer to my ques-

tion that in the first mile there was a rise here of 678 feet; that is, you say within 80 feet going east from this line there is an abrupt rise?

A. No, sir, on the west side of the I. C. corner.

Q. Then it is not in the first mile?

A. No, sir.

Q. Mr. Duval, did you observe the character of the timber and vegetation surrounding this I. C. corner?

A. Yes, sir.

Q What is it? Describe it briefly to the court and jury. For a thousand feet west of the I. C. corner what is the character of the soil and surface, and the timber and vegetation?

A. The soil is sandy, rocky in some places, and the timber is pinons and cedar.

153 Q. What is the character of it to the north of the I. C. corner for a thousand feet along where this diagonal line is run, and generally to the north of it, for a thousand feet radius?

A. It is sandy and more rocky than the boundary line is, and the timber is the same, pinons and cedar.

Q. And to the south what is the character of the surface and of its vegetation?

A. For the first thousand feet?

Q. For the first thousand feet.

A. About the same.

Q. And to the east?

A. To the east more sandy and not so much rock, and pinon and cedar.

Q. Substantially, then, there is no change in any direction for a thousand feet from the I. C. corner?

A. No, sir.

Q. How is it as to the second thousand feet of the I. C. corner?

A. It rises up more abruptly.

Q. And rises up more abruptly when you go a thousand feet west?

A. Yes, sir.

Q. After you pass the point you speak of as being a more abrupt rise, this 1,659-feet point, is there any change there in the vegetation and timber?

A. It is a steep slope of the mountain there.

Q. Just before reaching that 1,659 — point, or at that point, do you reach a small creek?

A. No, sir; not on the diagonal line.

Q. On the Baca line 1,659 feet northeast from the initial corner is there any change in the surface?

A. It slopes up very abruptly on the side of the mountain at 1,659 feet.

Q. In the second thousand feet from the initial corner going into the mountains, is there any change in the vegetation, or in the timber, or in the character of the soil, and if so, what?

A. The rocks show up more prominent than they do in the first thousand feet.

Redirect examination.

By Mr. VAILE:

Q. Mr. Duval, is it not an abrupt change from nine and a fraction feet per hundred to 24 feet in a hundred?

Objected to because that is a mere matter of figures.

Mr. VAILE: It is preliminary to another question.

154 The COURT: I do not think it is competent.

Q. How far northeast on the diagonal line from the initial corner is the place where it commences to rise 24 feet per hundred? Won't you just figure it up to see?

A. On a diagonal line northeast of the initial corner where it commences to rise at the rate of 24 feet in a hundred—a thousand feet.

Q. Well, then, if the change from between nine and ten to twenty-four feet in a hundred is abrupt, the abrupt change commences much earlier than 1,500 feet from the initial corner, does it not?

A. Yes, sir.

Q. When you speak of abrupt change, you mean the foot of that mountain where the vertical angle has been taken, do you not?

A. Yes, sir.

Q. And that is about 1,500 feet away, is it not?

A. Yes, sir.

Q. From the point where you take the vertical elevation it is a very straight smooth line running up the mountain, as shown on the model?

A. Yes, sir.

Q. Did the surveyors walk over that mountain at all?

A. No, sir.

Q. When you say it represents the contour, do you mean it represents from this point all the various undulations in the mountain?

A. No, sir.

Q. What do you mean, from the point where you say the vertical angle is taken, and from the point where the diagonal line is drawn in a straight line upward?

A. It shows the slope of the mountain.

Q. The angle from here to the top of the mountain, would it show any of the deviations in the surface from the point of observation to the top of the mountain?

A. Yes, sir.

Q. Are any of these profiles intended, from the point where the vertical angle is taken and the straight line drawn upwards, to show the deviations in the surface?

A. No, sir.

Q. But to show the average course from the point of observation to the top of the mountain?

A. Yes, sir.

Q. Mr. Duval, did you observe the steep peak, mountain peak, which is designated as "Crestone peak," just east of the line of the Baca grant, southeast of the northeast corner?

155 A. Yes, sir.

Q. I will ask you, for the purpose of mathematical computation for use hereafter, to state whether you have solved or can solve this problem: Assuming that Crestone peak is 107½ chains south, in a direct north and south line from the north line of Baca grant extended eastwardly, and that the angle made by a line drawn to Crestone peak from initial corner, the angle made by such line with the north boundary of the grant, is 16 degrees, 51 minutes; on the assumption that the longitude of Crestone peak is 105 degrees 34 minutes and 54 seconds west of Greenwich, can you from that data tell the longitude of the initial corner?

A. Yes, sir.

Q. What would it be upon that data?

A. 105 degrees 40 minutes and 6 seconds.

Q. These profiles are drawn upon a scale in which the vertical scale is greater than the horizontal. I will ask you to state whether in engineering and drafting for profiles extending over considerable country, as in the case of railroad surveys, and things of that sort, it is usual to magnify the scale in that way?

A. It is.

Q. It is for the purpose of bringing into relief the undulations of the surface, is it not?

A. Yes, sir.

Q. And is the recognized method of illustrating topography on the line of profile?

A. Yes, sir.

Recross-examination.

By Mr. SMITH:

Q. Mr. Duval, this Exhibit 38, looking at the exhibit as a whole, Mr. Duval, I will ask you to state whether it at any point or any line thereon shows the actual contour of the surface? None of this is drawn to the natural scale, is it?

A. It shows the surface on that scale.

Q. I say, do any of these lines show it according to the natural scale, the same as the way I showed to the jury a moment ago?

A. No, sir.

Q. None of these do?

A. No, sir.

156 THOMAS L. DARBY, a witness produced on behalf of the plaintiff, after being duly sworn, upon oath testified as follows:

Direct examination.

By Mr. VAILE:

Q. Mr. Darby, state your name to the court and jury.

A. Thomas L. Darby.

Q. Where do you live, Mr. Darby?

A. Cripple Creek, Colorado.

Q. What is your business?
A. Civil and mining engineer.
Q. How long have you been a civil and mining engineer?
A. About 24 years.
Q. How long have you practiced your profession in this State?
A Since the summer of 1874.
Q. About twenty years?
A. Twenty-one years, yes, sir, I have been longer than that in the profession, but that length of time in Colorado.
Q. Are you the person who made the completion survey of Baca Grant No. 4, and established and located the northeast corner up in the mountains?
A. Yes, sir.
Q. Did you study the topography of that country pretty thoroughly in the progress of making that survey of the east and north boundaries?
A. Yes, sir.
Q. I will ask you if you have since that time had occasion to examine the locality and its topography?
A. Yes, sir, I was there on the 9th, 10th, and 11th of this month.
Q. You may state to what extent you have personally been over and traversed the mountains in the northeast corner of Baca Grant No. 4.
A. I have been over the north boundary east to the corner and up within a mile and a half of the corner on the east line.
Q. Then have you examined the base of the range?
A. Yes, sir.
Q. I will ask you to state whether or not you have placed upon any map of Baca grant the topography of the mountainous portions as you have found it to be by your observations?
A. Yes, sir.
Q. (Producing a map.) What is this map that I exhibit to you?
157 A. That is a map of the grant, but I did not make this part of the map (indicating), I put the topography on the east part.
Q. The topography, then, on this map is your handiwork?
A. Yes, sir.
Q. I will ask you to state whether it correctly represents, according to your observations, the topography of the mountains in relation to the valley in which the grant lies.

Objected to by counsel for defendant, for the reason that no map can correctly show the topography; that it is impossible to show the topography in relation to a point as indefinite as the initial corner, and that the topography generally for the purpose of this issue to which this testimony is being directed, could not possibly be shown by the map; that the witness is here and has been on the ground and that counsel should ask him what the topography is, as a matter of fact, not what he has attempted to reproduce upon a scale which must be so infinitesimally small as this must be.

The COURT: I think you had better not use the map, but ask him the question.

Mr. VAILE: We desire to ask him whether he has placed upon this map the topography as he found it upon the ground, and then to introduce the map, so that we may have an illustration of what this witness means; we cannot explain by words as well as we can by a map the relation of things.

The COURT: The word "topography" has a very close and definite meaning. If you will avoid the use of the word topography and ask a question which comprehends the general subject of the mountainous region perhaps we can allow it.

Q. Mr. Darby, I will ask you whether, after having traversed these mountains, you made a survey of the north boundary and the east boundary of the grant in the northeast corner and made your observations at the base of the mountains of which you have spoken, and whether you marked upon this map here before you the mountains in their relations to the ground as shown by your observations?

A. I have.

Q. Do they correctly express your own observations with regard to the relation of the mountains to the plain?

A. Yes, sir.

Whereupon counsel for plaintiff offered said map in evidence; to which offer counsel for defendant objected, and objected to
158 the introduction of that map and its insertion into the record, for the reason that its only identification and the only statement in the witness's testimony in relation to it is the one which has just been made, and that the defendant should not be bound by the statement, and it should not go to the jury, it being an attempt to mark upon a map so plain a feature upon the surface of the ground as a chain of mountains and their relation to the plain upon such a small scale as to be impracticable and impossible.

The COURT: You are at liberty to ask the question whether it presents the country well, but it is not for the court to say that it does not present it at all.

The witness uses a map as illustrating his testimony; its value is a question to be considered at all times.

Whereupon said map was received in evidence, and marked Exhibit No. 39, and the same is covered by the order of certification hereinafter set out.

Counsel for defendant then and there reserved an exception to the ruling of the court, admitting the introduction of said map in evidence.

Q. Mr. Darby, did you recently act with Mr. Duval in making a further survey of the country in the vicinity of the initial corner, the relative levels and character of the country, and the relation of the mountains to the valley?

A. Yes, sir.

Q. Have you examined the profiles which have here been offered in evidence in connection with Mr. Duval's testimony?

A. Yes, sir.

Q. I call your attention to Exhibit 37, and I will ask you to state to the jury, as a civil engineer, what the custom is in reference to delineating profiles upon scales horizontal and vertical. I wish you would illustrate, if you please, quite fully, the methods of expressing such relations with vertical and horizontal distances.

A. It is always usual in engineering to exaggerate the vertical scale in a profile, for the reason that the height of anything as compared to the surface of the earth is so slight that you cannot appreciate irregularities drawn on the true scale. If you could conceive a man standing whose height was at *at* the same scale as this map, he could appreciate what the natural slope was looking at it merely as a projection, but we cannot appreciate it on the map, no eye can, it is a thing that is so very deceptive, and consequently you have to exaggerate in order to form any conception of the irregularities of the earth's surface. Usually in railroad work the exaggera-
159 tion is ten to one, make the vertical scale ten times as much as the horizontal. That is done for the purpose of fixing grades. You could never use your rules for cuts and grades on railroad work except you exaggerated the vertical scale.

Q. A railroad grade would be shown on a scale of ten to one?

A. Yes.

Q. Much greater than these?

A. Yes, sir, very much so. You could not make a profile of that country on a ten to one exaggeration at all.

Q. On this map marked Exhibit 37, both the natural scale and the exaggerated scale are shown so as to illustrate the difference between the two?

A. Yes, sir.

Q. You may state whether these profiles on the scale that you have made, correctly represent the various lines over which these surveys were extended when you and Mr. Duval were on the ground recently?

A. Yes, sir.

Q. Have you, Mr. Darby, examined the model which has been produced in court here, to represent the contour of the country in controversy?

A. Yes, sir.

Q. Have you checked this model off recently and carefully, for the purpose of seeing whether upon the scale it purports to bear, it correctly represents the relative position of points and the relative altitudes?

A. Yes, sir, I have.

Q. You may state whether or not it does, in so considering its scale, correctly represent that which it purports to represent?

A. Yes, sir, it does.

Q. If a line were drawn from the point of sudden and abrupt change at Willow creek, one mile north of the north line of the Baca grant to the place of sudden and abrupt rise at the Crestone

creek one mile north of the north line of the Baca grant, would or not that line represent the average course of the base of the range between the points mentioned?

A. Yes, sir, it would.

Q. I will ask you to state where the initial corner of Baca grant is in reference to the line of the range which you have just mentioned?

A. It is on that line practically.

Q. I will ask you whether the Baca grant itself, the north boundary of the Baca grant ascends the mountain range in its steepest course, or diagonally?

A. Diagonally.

Q. What is the direction from the initial corner to the nearest mountain?

160 A. The nearest high mountain? North 40° east.

Q. You may state whether the base of that mountain extends to the vicinity of the initial corner?

A. It does.

Q. State whether or not it flattens after passing the initial corner going southwest?

A. Yes, sir.

Q. What line upon this model, which is Exhibit 36, would represent, if any of them would, that mountain which comes down thus?

A. That line (indicating).

Q. Marked "B B"?

A. Yes, sir, marked "B B."

Q. You may state whether or not this ridge is plainly apparent in viewing the mountains from a little distance away, say a half a mile away?

A. Yes, sir.

Q. Can you describe the general appearance of the mountains as they come down in this direction, as seen from a half a mile away, or a mile away?

A. Yes, sir, right in that particular line there is a succession of little slopes or ridges down the mountain range. That is the most prominent one of any of them coming right down to where the initial corner is, the top of the range is to the northeast, and they have a succession just like your fingers of little depressions between.

Q. Not very little, are they: you mean little with reference to the mountain range?

A. With reference to the mountain range, as you look at them from a distance; the most prominent of these is that line that we took the course on there.

Q. From your observation of this country in reference to the trend of the range itself, the trend of the various points in relation to each other, and of the steepest ascent from the general country below, what would you say as to whether the initial corner is located at the base of the range?

A. I should say it was located there at the general trend of the base of that range, as near as any one could get at it.

Q. From your knowledge of the country, which is acquired both from your old survey of the north boundary and your study of the country at that time, and from your study of the country on this recent trip, you may state whether or not it would be practicable, in your opinion, and whether you could as a surveyor go upon the ground and definitely locate the initial corner of the Baca grant, if you had no call except the following: "Commencing at the eastern edge of the San Luis valley, where the 38th parallel of latitude crosses the base of the snowy range dividing the waters
161 of the Arkansas and the Del Norte rivers," assuming for the purpose of the question that the north boundary of the Baca Grant No. 4 is the 38th parallel of latitude, could you as an engineer, with no other call than that, find the initial corner?

A. Yes, sir.

Q. You may state, if you were to locate the initial corner upon such a call, where you would locate it in reference to the point where Mr. Sheldon located it.

A. I think I should locate it just about there, maybe a foot or two one way or the other, but right in that immediate locality.

Q. Have you the notes which show the grade on this diagonal line?

A. Yes, sir; a part of it.

Q. What is the grade, that is, the rise per hundred feet is the way I would like to have you express it, for the first four hundred feet northeast of the initial corner on the line B B?

A. Ten feet in a hundred.

Q. Have you the data to show what the fall per hundred feet is immediately southwest of the initial corner on the same line?

A. No, I have not. Mr. Duval has that.

Q. It is not in your notes?

A. No, sir.

Q. I wish you would give the rise per hundred feet from this point (indicating) northeasterly along this line, up to the point where you took a vertical angle.

A. Well, the next 502 feet is 9 feet; then for 96 feet, $9\frac{1}{10}$ feet; then for 366 feet it is $24\frac{1}{10}$ feet per hundred; then for $83\frac{3}{10}$ feet, or 84 if you choose to call it, it is 17 feet and then for 202 feet on top of the little ridge it is $3\frac{3}{10}$ feet.

Q. There it follows flat for a little ways?

A. Yes, sir; for a very little ways.

Q. Then the mountain goes up at $44\frac{4}{10}$ feet per hundred?

A. Yes, sir.

Q. Taking these general slopes, from the point where you speak of taking an angle, do you follow the various undulations of the surface?

A. No, sir; we took the angle from that point to the top of the mountain.

Q. But at a place where it rose?

A. Yes. At the foot where it rose.

Q. And then drew for your contour the straight line as shown by that angle?

A. Yes.

162 Q. From this point, where you took this vertical angle, from there to the top of the mountain what would be the rise per hundred feet?

A. $44\frac{4}{10}$ feet per hundred feet.

Q. Besides the matter of grades, that is, of rise of the country, and the average trend of the foot of the mountains, I will ask you to state whether there is in this locality anything in the nature of the soil or surface of the ground which distinguishes the mountain country from the plain country.

A. Yes, sir; rocks principally.

Q. Take it on the north boundary line of the grant, what is the nature of the country east of the initial corner for the first half mile, as compared with that west of it?

A. Well, the country east of the corner is all rock. Of course all of that country has more or less sand in it, but east of that corner it is all rock, and it is broken up more or less by dry ravines, or washed out at places, little things of no importance, but still they cut into the land. It is rocky all the way up there, and the creek comes along and crosses and recrosses the line in several places, breaking up the country; and from there on it is a mountain going on towards the east.

Q. You rise in a sort of a basin in the mountain, to some extent?

A. This line runs up along the valley of the South Crestone creek before you are at the general trend of the base of the range at the initial corner; after that the country does not immediately rise right up from there because this Crestone creek comes in down close to the line.

Q. That is the South Crestone creek?

A. Yes, sir; comes down close to the line all the way for half a mile or more, and while you are in the mountains, it does not show an abrupt rise.

Q. Immediately off the line within a few hundred feet from the corner, you get right into the general trend of the mountains?

A. Yes.

Q. That is to say, by departing from this straight east-and-west line at the initial corner, you get into the mountains very quickly?

A. Yes, sir; at once.

Q. That would be on the course of the diagonal line B B on the model?

A. Yes, sir.

Q. Is this Crestone creek which you say follows down along on the line the same as is in the Sheldon survey known as the Trois Teton?

163 A. Yes, sir.

Q. Did you mark upon the base of this model, which has been marked as Exhibit 36, the positions of the creeks?

A. Yes, sir.

Q. Are they correctly represented on there, and as found by your surveys crossing the lines in the model?

A. We did not run them out.

Q. But the course of the profile lines there are correct?

A. Yes, sir.

Q. At Willow creek I will ask you to state what the course of the mountains is right there?

A. Right at the creek the mountains begin to rise very abruptly and very steeply.

Q. Is the creek itself in a cañon?

A. Yes, it is down possibly fifty or sixty feet deep where it breaks down into the general trend of the mesa along there.

Q. You have spoken of the rocky character of the country east of the initial corner. How is it as compared with that part of the country west of the initial corner (alone) the line of the Baca grant?

A. The country west, when you get away from the creek there, is a good, smooth country, and slopes to the west, the slope to the west is a good smooth country; the only place where it shows rocks is along the present bed and the old bed of the creek, where the creek washed it out and left the rocks exposed along the bottom; away from the creek it is a good smooth piece.

Q. Between the locality of the initial corner and the point marked "Station 51" upon this plat, is there any village situated, or hamlet?

A. Yes, sir.

Q. What is it called?

A. Crestone.

Q. The town of Crestone is marked on this other map?

A. Yes, sir, right in there (indicating).

Q. What sort of country is it that lies over in the vicinity of Crestone?

A. Pretty sandy country; farms there, and gardens.

Q. Descending to the southwest?

A. Yes, sir.

Q. That is on the east side of Crestone creek?

A. Yes, sir.

Q. Mr. Darby, when you made your survey of this country two years ago, or three years ago——

A. Two years and a half ago.

164 Q. (Continued)—did you have occasion by your triangulations or measurements to ascertain the distance of a certain point or peak, which is known as "Crestone peak," from the north boundary of the Baca grant extended?

A. Do you refer to what Hayden calls "Crestone peak?"

Q. Yes; how far, measured in a north and south line, is that point called "Crestone peak" by Hayden, south of the north line of Baca grant extended easterly?

A. 107½ chains.

Q. Is that peak visible from the initial corner?

A. Yes, sir.

Q. Did you take the angle which a line to that peak would make with the north line of the Baca grant?

A. Yes, sir.

Q. What was that angle?

A. 15 degrees, 51½ minutes.

Counsel for defendant thereupon asked to be permitted to reserve the right to have this testimony stricken out.

Q. Mr. Darby, with that data, and on the assumption that the longitude of Crestone peak is 105 degrees, 34 minutes and 54 seconds west of Greenwich, can you tell what the longitude of that initial corner would be?

A. Yes, sir, 105 degrees, 40 minutes and 6 seconds.

Q. I will ask you to state whether upon one of these profiles the crossing of the creek east of the initial corner is shown?

A. That is, the direction of the crossing?

Q. Yes; the stream is flowing right along the grant line for a little distance?

A. Yes, sir.

Q. And this (indicating) is where this profile line would come out?

A. Yes, sir.

Q. I will ask you to state whether it is the stream which upon this model Exhibit No. 36 is shown upon the grant line east of the initial corner and upon the line A A.

A. Yes, sir.

Cross-examination.

By Mr. SMITH:

Q. Mr. Darby, what is the controlling feature which would lead you to select the particular point where this initial corner is, as being the base of the snowy range?

A. The evidence of it on the surface of the earth, evident to the eye. You can see it.

165 Q. What is there different there from any point within—say a thousand feet east or west of that line, along that parallel?

A. It is the general difference in the slope of the country, sir.

Q. Have you made any map or profile which shows any difference?

A. The map shows it.

Q. Will you please point it out?

A. It shows right on the model here. If you go there on one of these little ledges here you can see it down there for fifteen or twenty miles, you can see the general trend of the base of the mountains.

Q. How far down the mountain do you go before you come to the base of it?

A. Where the slope changes.

Q. Now, does the slope change right after you get to that point?

A. Yes, sir.

Q. Let me ask you now, if that is the general feature which led you to select that as the point for the initial corner?

A. Yes, the slope of the range there.

Q. Is there any other reason than your mere general view which you took of the entire range, for selecting some particular line along the edge of the mountain which you say is the base?

A. I took the difference in the levels.

Q. What is the difference in the level at this point?

A. There is a difference right there on that diagonal line of perhaps two feet and a half in a hundred, right there. In determining a line of this kind you can't take the base of the range for what would be the extent of the country for a hundred feet square, or two hundred feet square, but the general trend of the base.

Q. Take it for a thousand feet square; take it for a thousand feet in all directions from this point which you say is the natural, the only place for the initial corner of that grant; what change is there, what distinct physical feature on the surface of the ground is there which tells you that that is the point for the initial corner?

A. The slope of the ground.

Q. Is that all?

A. The rocks and the slope, and the solid rocks of the mountain decomposed and broken off.

Q. Is that all?

A. I don't see as you want any more.

Q. Is that all? It makes no difference what I want.

A. Yes, that is all.

166 Q. Is it the slope of the ground, substantially, and the character of the soil and the fact that there are rocks here?

A. Sometimes it is the character of the soil, and sometimes it is not the character of the soil; it is the solid rock of the mountain.

Q. It is the slope and the solid rock in the mountain. Is there anything else?

A. No.

Q. I am speaking of a piece of territory of a thousand feet in every direction from this initial corner. What is there in that square of a thousand feet square which leads you to say that that initial corner is exactly the base of the range?

A. A thousand or two thousand feet would not be anything to determine by, it is the general trend of the base of that mountain in ten or twelve miles is what led me to take that point.

Q. Then you disregard the main surroundings of the initial corner?

A. It would not be disregarded, because here is a line which incidentally runs up the valley of the creek, you can run up there for a half a mile, before you come to an abrupt slope, and I maintain you have got to determine it by the general trend of the slope of the mountain.

Q. And following along the 38th parallel going east, if I understand you now correctly, you strictly follow along this small creek, and following that up there is no material change in the grade or elevation?

A. I think there is in the elevation.
Q. Where is the material change?
A. It begins within a few feet of the corner and gets steeper and steeper as you go up.
Q. You made this map partly?
A. I did the lettering on it.
Q. Is it correct?
A. I scaled it and checked it.
Q. And made all this correct?
A. Yes.
Q. And this lower line here marked "Natural scale 1 inch to 400 feet;" does that or does it not, correctly show the general grade of the country there east and west along the 38th parallel from the initial corner?
A. Yes, sir.
Q. Well, now, following along that parallel, that is what the survey calls for?
A. Yes, sir.
Q. Go east upon the parallel until you get to the base of the range?
A. Yes, sir.
167 Q. Following along from this initial corner here, there is an abrupt rise in front of you, is there?
A. Not absolutely abrupt.
Q. Is there any material rise, is there any change?
A. A rise of a few feet in a hundred.
Q. Is there any more than the ground over which you have traveled for two miles back?
A. Yes, sir.
Q. Then is Mr. Duval wrong in his statement of this?

Objected to by counsel for plaintiff.

A. There is 672 feet rise from the mile east, and 400 in the mile west. Is that not a very decided change?
Q. Do you know where in this rise that 672 feet rise came?
A. It is rising all the way.
Q. Where does it rise most?
A. It rises most towards the last half of it, the rise increases as you go up, go east.
Q. Do you remember, or do you know what the rise was in the first thousand feet east of the initial corner?
A. I have not got the levels, Mr. Duval had those, a pencil memorandum of it made.
Q. The memorandum he made of it was correct according to your mutual survey?
A. Yes, sir.
Q. He said it was 10 feet. That is correct is it not?
A. That is correct if he said that.
Q. And if he said it was $8\frac{2}{10}$ feet before you got to the initial corner; that was also correct?
A. Yes, sir.

Q. Then of course it follows that there was no material change in the rise going east on that parallel? Didn't he say it was $11\frac{2}{10}$ for the first thousand feet?

A. No, sir, he said it was $8\frac{3}{10}$.

Q. So that, aside from the change in the elevation, and the fact that there are decomposed solid rocks in the mountains there, you are not prepared at the present to indicate any further feature which would lead you to select that as the true point of the initial corner?

A. And the general trend of the base of the range.

Q. Going up the ridge, I see where there is the grade there, looking down for fifteen or twenty miles. Would you say it was the general contour of the base of the range?

A. You understand I was travelling up and down the base of that range there seven or eight times, and have been down through this town of Sangre de Christo, and along there, and know the country pretty thoroughly.

168 Q. You have been more or less in the employ of the gentlemen owning the grant, have you not?

A. No, sir.

Q. You made the survey for them made to complete their survey two years ago, did you not?

A. I made the Government survey.

Q. And when you went down this time on the 9th, 10th and 11th of the month, you went there at their request?

A. Yes, sir.

Q. And this initial corner was pointed out to you?

A. I knew right where it was; I found it.

Q. Did you go up on this high ridge and look down along the foothills?

A. Yes, sir.

Q. And you made up your mind that about there is where the general average base of the mountain would strike?

A. Yes, sir.

Q. Now, in locating and determining the general range of the mountains, what is it that determines to your mind where the base of the mountains is?

A. The change in the slope.

Q. Then in looking for this point you would look for a corresponding change in the slope of the base of the mountain?

A. I would determine that line by that general change of slope.

Q. In your direct testimony you said that going into the mountains on the 38th parallel you would have to depart from the parallel really to get into the mountains. Did you mean that?

A. When did I say that?

Q. That is as I understood; if you didn't say that I am mistaken; it is true.

A. When I run the line after I got east of the second mile, two miles east from the initial corner, then you have to depart; no man could go over it there.

Q. In response to Mr. Vaile's question I understood you to say that when you reached the initial corner in order to get into the

mountains,—not at the time you made your first survey, but now, to get into the mountains proper would you have to depart from the mountains proper to get into that parallel; that the mere fact that the parallel carried up the general line of the creek caused a change at that point?

A. You have got it all mixed.

Q. Is that true or not?

A. I did not see anything of the kind.

Q. I am asking you whether it is true, the fact that the parallel goes into the mountain if followed up the bed of the creek?

169 A. Not the bed of the creek; the valley of the creek.

Q. Following up the bed of the creek when you come to the initial corner in order to find the base of the mountain would not you have to go to one side or the other?

A. The mountain slopes there to the southwest, and as you go on to the east it slopes to the south coming down to this creek, and the base of the mountain is almost practically right at the initial corner coming from the northeast.

Q. The accident of the existence of this valley opening up and coming out of the mountain at the same point where the parallel enters, it would require you to make a kind of an abrupt angle and go further east into the mountain, would it not?

A. It is steep on the mountain slope.

Q. It would require you to go two miles further east?

A. No, sir, less than a mile.

Q. How much timber is there about this I. C. corner for, say a thousand feet each way; is there any change in the timber for a thousand feet east and west?

A. I didn't take any particular note of it, there is going into the mountain.

Q. Is there any change in the nature of the mountain as to being rocky, or otherwise?

A. Yes, sir.

Q. How much of a change would there be?

A. As you go west, when you get away from the old creek beds there the country is all covered with soil and grass; as you go east and northeast you come right into the rocks there.

Q. Are there more or less trees and more or less vegetation as you go east and west from the initial corner?

A. As you go east there is some trees and vegetation,—I suppose you mean by that grass—there is more grass as you go west.

Q. About the initial corner, for a few hundred feet in each direction from the initial corner is the ground particularly rocky?

A. Well, to the northeast, yes.

Q. After you come to the rise?

A. Right at the initial corner there is not much rock, but for about two hundred feet to the northeast there is, but going east about two hundred feet you come into the rock, probably one of the old creek beds.

Q. How far is the creek from the initial corner?

A. The creek I would judge was probably 400 feet south of the initial corner.

Q. And running in what direction?

A. Running in a direction a little south of west.

170 Q. How far is it northeast on the diagonal line before you come to a sudden, abrupt rise, if you remember?

A. About a thousand feet, a precipitous mountain goes up.

Q. That is the rise which you designate as being $24\frac{1}{10}$ feet in one hundred?

A. I think so; that is right.

Q. And for the first thousand feet going northeast the rise is what?

A. As to the first 408 feet, 10 feet, and as to 502 feet 9 feet in a hundred. That is accounted for, the 502 feet in this way,—the last one hundred feet of that is nearer flat, sort of a sandy nature.

Q. Otherwise it would be about the same as the first one?

A. Yes, sir, otherwise the general slope is about the same, being about 10 feet in a hundred; the last 100 feet is a little sandy flat place.

Q. And that I understand to be the steepest grade you could find in the neighborhood of the I. C. corner?

A. No; that merely went onto a little local ridge, and we went up that on a slope of 24 to a hundred.

Q. I am speaking of the first thousand feet of the diagonal line you made, where you searched for the steepest grade; you gave one steeper than that; we want it at this main general ridge coming down in the mountain, you gave one a little more to the north which would have been steeper than ten feet for the first thousand feet, and we want it at that main ridge coming down there.

A. I took it that way; it is steeper; as you go a little more to the northeast it would be still steeper.

Q. At what visit was it that you located the longitude of the initial corner?

A. Well, I located this upon my original survey; located all those peaks for the purpose of making the report.

Q. Did you ascertain whether or not the I. C. corner was upon the 38th parallel?

A. I never made any observations of my own; it was established by the Government.

Q. Did you make all of this map?

A. I only put on the topography.

Q. You only put on the mountainous corner?

A. It was an old map and I erased the topography they had there and put it on from my own notes.

Q. The letters there, the N., what is that intended to represent?

A. That is 1 M., one mile.

Q. And that other, 2 mile, comes right there at the base of the mountain?

171 A. Yes, sir.

Q. And that is the initial corner here?

A. That is the initial corner.

Q. Does this correctly represent the streams flowing on this grant?

A. Yes, sir; that is, as near as you can from that scale.

Q. This is the stream that you spoke of?

A. That is the Trois Tetons.

Q. Did you run out these streams so that you know these are correct; did you establish the base line all along here and take up each of these points, up the stream?

A. They are all marked there, Cotton Wood, Spanish, South branch, Willow creek; all marked upon that, that is all.

Mr. VAILE: I will just offer one more matter, to which I do not suppose counsel will object, and that is a statement from the Geological Survey, of the longitude of Crestone peak, given upon page 285 of the United States Geological and Geographical Survey of the Territory of Colorado and parts of adjacent Territories as follows: (Reads:)

"Names of points".....	"Longitudes".....
* * * * * *	* * * * * *
"Crestone Peak"	"105° 34′ 54″"

Thereupon, counsel for plaintiff offered in evidence a certified map from the Hayden geological and topographical survey, certified by the director of the Geological Survey and by the Secretary of the Interior, made in 1873, showing the contour lines at every 200 feet vertical; the purpose of the testimony already introduced being to enable plaintiff to show where upon this map Baca Grant No. 4 would be, which can only be done by determining the longitude; this offer being for the purpose of locating Baca Grant No. 4, and of fixing the longitude of the initial corner upon this map, and to locate the grant upon this map.

Whereupon said map was received in evidence and marked as Exhibit No. 40, and is included in the order of certification hereinafter set out.

Counsel for plaintiff then offered in evidence the model which has been heretofore marked as Exhibit No. 36, which exhibit was received in evidence, and is included in the order of certification hereinafter set out.

172 It was thereupon stipulated that the Baca grant has been marked continuously up to this date upon the official maps issued by the Land Department of the United States; subject, however, to the same objections, that that fact does not enlarge their grant.

Whereupon counsel for plaintiff offered in evidence the latest map issued by the Land Department, showing the Luis Maria Baca Grant No. 4, which was received in evidence and marked as Exhibit No. 41, and is included in the order of certification hereinafter set out.

Thereupon the plaintiff rested his case.

And this was all the evidence introduced on the trial of said cause.

(WEDNESDAY, *May 22d*, 1895.)

Whereupon the defendant by counsel made the following motion, to wit:

The defendant desires to move at this time for an instruction from the court to the jury directing a verdict in favor of the defendant, upon the ground of the failure of sufficient proof to maintain the plaintiff's case, the grounds of the motion being:

First. That there was no sufficient or proper selection of the land granted by the act of Congress of June 21st, 1860, within the time limited by the act, three years from th-t date. That the so-called selection of Watts was void by reason of the uncertainty of the description, and that the designation of the initial corner as the base of the range was not a sufficient description to identify the land, and that no further acts of identification or of selection of any kind or nature were had or done within the three years' limit of the act of Congress.

Second. Because the act of Congress reserved all mineral land, and forbid the entry upon mineral land, and because there has never been at any time any form of conveyance, or any patent or deed, or any act of Government, or of its officials, which had the effect of conveying the estate which the Government reserved by the act, to wit: mineral land of any kind. Because it is conceded by the pleadings in this case, and is shown by the proof, that the land in controversy is claimed and held by this defendant, and by his grantees, as mineral land; and that it is mineral land.

Third. Because the proof of the plaintiff shows that no sufficient or proper survey of this land, or complete survey, was made upon the ground until the lapse of three years after the so-called
173 selection by Watts; that the Sheldon survey was incomplete, and remained incomplete, until the Darby survey in 1892.

Fourth. We make a special objection, and as a ground of this motion, that the approval of the plat made by Surveyor General Pearce on the 18th day of March, 1864, was expressly made subject to the provisions and conditions of the act of Congress, and because the evidence already introduced shows that a certificate of the surveyor general that this was vacant land and not mineral, made upon December 5th, 1863, was expressly and in terms rejected and disapproved by the Commissioner of the General Land Office in January, 1864, and no further or other certificate was ever made by the surveyor general upon that subject.

Fifth. Also, because the evidence in this case shows that the real claimant and locator of this ground, William Gilpin, located, or attempted to locate this grant, in violation of the terms of the act, and in violation of its provisions and limitations, and with knowledge that he was seeking to take mineral land; and because that is shown by the record upon which the plaintiff must rely, and with knowledge of which *they are* charged.

The COURT: I have reached the conclusion that the defendant's motion should be sustained; and I suppose I had better say what I have to say upon the subject in the way of a charge to the jury. It will put the matter in the best form for the record.

(And to the decision of the court in sustaining the motion of the defendant for a direction to the jury for a verdict in the defendant's favor, the plaintiff at the time objected and excepted.)

Thereupon the court instructed the jury as follows:

Instructions to the Jury.

HALLETT, *J.* (orally):

This action, gentlemen of the jury, is to recover a small plat of land in what is known as the Baca Grant No. 4 in the San Luis valley; I think it is in the county of Saguache, but I am not sure whether the county is given in the complaint.

The plaintiff relies upon an act of Congress passed June 21st, 1860, by which the heirs of Luis Baca were permitted to locate this tract of land. You have heard the testimony at great length as to the way in which the location was made and surveyed and all the proceedings in the land office in respect to it. Objection is
174 made that the location was not within the time limited by the act of Congress, which was three years, and that is put upon the ground that there was no sufficient description of the tract located to make it known to the public at large where the location would be, and upon the ground that the initial point from which the survey of the tract would be extended was not a fixed and determinate point. That was declared in the paper filed with the surveyor general of New Mexico to be the point where the 38th parallel of latitude crosses the base of the snowy range which divides the waters of the Arkansas and Del Norte rivers at the eastern edge of the San Luis valley. It is said that this is not sufficient to fix the location, and there should have been some monument or some natural object open to the view of all people from which the lines should be run. Upon that I do not care to enter at length; I shall assume that the testimony which has been delivered before you is sufficient to enable you to determine this point, and that you would determine it under the testimony to have been properly fixed. If the location was so designated as to be understood by the public at large, I am of the opinion that the circumstance that no survey of the location was made within the three years following the passage of the act is not material; a survey was in fact made in the latter part of the year 1863, and about six months after the expiration of the three years mentioned in the act. I assume also that the survey made by Mr. Sheldon was sufficient in form. The lines were not closed at the northeast corner; there were three or four miles of the north line, and perhaps a greater length of the east line, which were not laid at that time, because of the difficulty of traversing the mountains. The surveyor states in his notes that he found it impossible at the season of the year in which he was carrying on the work, to proceed over the mountains, and so the lines were not laid at the time. This survey having been accepted by the officers of the Land Department, and approved by them, it cannot be alleged that it was not in form sufficient; or that there was any defect in it from the circumstance

that a portion of the lines were omitted from the survey at the time when it was made.

Upon that we come to another question, which is the most important in the whole case, and that is, whether mineral lands passed by the terms of the act and what was done under it, to the grantees therein. The act itself declares that the location of the tract shall be upon lands vacant and not mineral. The grantees, the heirs of Baca, were not at liberty to select mineral land. The complaint describes the land of which the defendant is said to be in possession, and which he wrongfully withholds from the plaintiff, as mineral land; so that you have no question to consider
175 whether the lands were or were not of that character; the plaintiff having averred that they have the character of mineral lands, there is no issue upon that point. So, that the question presented and simply stated is whether mineral lands passed under the grant of the act of June 21st, 1860, and, as I have said, the grantees under that act, the heirs of Baca, were required to select lands which were not mineral. In any selection which they could make they could not determine the quality of the lands in that respect; that is to say, they could not determine in a manner which would be conclusive upon the Government and upon subsequent claimants under the Government, whether the lands were or were not mineral. In order to make a valid determination of that matter there must be some participation by the Government in the selection; that is to say, the Government must investigate and pass upon the question whether the lands selected were or were not mineral.

And so we come to the question whether anything was done by the Government in that direction at any time whatsoever, or up to the time of the approval of the survey of the lands. It is contended for the plaintiff that the act itself, and the selection of the lands under it, make a good title in the grantees named in the act, and it may be true that no other evidence of title was required. I have not looked into that question particularly whether there was authority in the Government to issue a patent for the land or not. It is said, and seems to be established by the various communications from the Land Department and the officers of that department, that they constantly maintain that there was no authority in the Government to issue a patent for the land, and, therefore, they have declined to issue it, upon all such occasions the officers of that department declared that the act of Congress and the survey with the plat of the land constituted the title of the grantees under the act. No further communication, and no other document or paper, could be issued by the Government in confirmation of the title of the grantees. However that may be, if it appeared that the officers of the Land Department in Washington had at any time passed upon the question of the conclusiveness of the grant, and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government, and binding upon all who might subsequently make claim to it.

It seems upon examination of the testimony which has been

offered to you that no such determination was made. The communication upon which the surveyor general of the Territory
176 of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral. The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado, of date February 12th, 1864, is that he will be authorized to approve the plat, upon finding it to be correct, in the usual way; and the Commissioner adds: "In your certificate of approval you will add the special reservation stipulated by the statute, 'but not to embrace mineral land, nor to interfere with any other vested rights, if such exist.'" That is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land; the Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.

Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made, he said that it was subject to the provisions of the act of June 21st, 1860, and taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval. So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands as directed by the Commissioner, and if this be the correct construction of the papers and documents, and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be, would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.

There are several communications from the department to persons who were more or less interested in the tract, or who assume to have some interest in it, in which the Commissioner, or some one connected with the department, assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever. We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or to give it any other effect than that which it appears to have from the letter of February 12th, 1864.

Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in this case, that the act
177 of June 21st, 1860, and what was done under that act from time to time, did not vest in the grantees of Luis Maria Baca, and their successors in interest, the mineral lands which may be within the tract located. This, of course, has no effect whatever upon such part of the tract, which seems to be by far the greater part, as is not mineral. That which is pastoral and agricultural only, cannot be correctly described as mineral land, and it would

doubtless pass under the grant without any question whatever such as is presented to us here.

The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant, and which he claims as a mine, is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a verdict upon the testimony for the defendant in the suit.

And thereupon the plaintiff by his counsel objected and excepted to certain portions of the instructions so given by the court as hereinafter specifically set forth.

The court instructed the jury, among other things, as follows:

"I think that if it appeared that the officers of the Land Department in Washington had at any time passed upon the question of the conclusiveness of the grant, and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and whatever its character that the question was promptly decided by the Government and binding upon all who might subsequently make claim to it. *It seems upon examination of the testimony which has been offered to you that no such determination was made.*"

(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral."

(To which instruction of the court the plaintiff at the time objected and excepted.)

"The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado, of date February 12th, 1864, is that he will be authorized to approve the plat upon finding it to be correct in the usual way. And
178 the Commissioner adds: 'In your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land, nor to interfere with any other vested rights, if such exist.' That is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land."

(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"The Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character."

(To which last instruction so given the plaintiff at the time objected and excepted.)

"Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made, he said that it was subject to the provisions of the act of June 21st, 1860; and taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he

had put the exact words given to him by the Commissioner into the approval."

(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands as directed by the Commissioner."

(To which statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"And if this be the correct construction of the papers and documents and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made."

(To which last statement of the court in his instructions to the jury the plaintiff at the time objected and excepted.)

"There are several communications from the department to persons who were more or less interested in the tract, or who assumed to have some interest in it, in which the Commissioner or some one connected with the department, assume to say that the
179 matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever."

(To which statement of the court so contained in his instructions to the jury the plaintiff at the time objected and excepted.)

"We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or to give it any other effect than that which it appears to have from the letter of February 12th, 1864."

(To which instruction of the court the plaintiff at the time objected and excepted.)

"Upon all this, gentlemen, I feel compelled to state to you upon the principal matter embraced in the case, that the act of June 21st, 1860, and what was done under that act from time to time, did not vest in the grantees of Luis Maria Baca, and their successors in interest, the mineral lands which may be within the tract located."

(To which instruction of the court so given to the jury the plaintiff at the time objected and excepted.)

"This, of course, has no effect whatever upon such part of the tract which seems to be far the greater part as is not mineral. That which is pastoral and agricultural only, and cannot be correctly described as mineral land and it would doubtless pass under the grant without any question whatever such as is presented to us here.

The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims as a mine is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do, but to return a verdict upon the testimony for the defendant in the suit."

(To which last instruction, and each part thereof, so given to the jury, the plaintiff at the time objected and excepted.)

And thereupon under the instruction of the court as aforesaid the jury returned the verdict in favor of the defendant heretofore set out in the record.

To which verdict and the returning of the same the plaintiff at the time objected and excepted.

180 And thereupon judgment was entered in this cause in favor of the defendant, as hereinbefore set out in the record.

To the entering of which judgment the plaintiff at the time objected and excepted.

And thereupon the plaintiff asked and was allowed by the court sixty (60) days within which to present his bill of exceptions in this cause.

And thereupon, on motion of the plaintiff, by his counsel, made in open court, it was by the court ordered that in the event that the plaintiff shall desire to prosecute a writ of error to the circuit court of appeals for the purpose of reviewing the decision in this cause, there shall be certified by the clerk of this court direct to the circuit court of appeals the original exhibits introduced in evidence in this cause numbered and designated as follows, to wit:

No. 15. Photograph of Crestone mountains at the initial corner of Baca Grant No. 4.

No. 16. Photograph of Crestone mountains adjacent to grant.

No. 22½. Official map of the United States accompanying the report of the Secretary of the Interior for the year 1864.

No. 23. Official map of Colorado for the year 1866.

No. 25. Transcript of part of official map of Colorado for the year 1868.

No. 29. Plat prepared by Professor P. H. Van Diest, showing lands adjacent to initial corner.

No. 34. Plat of completion survey of northeast corner of Baca Grant No. 4.

No. 35. Manual of instruction to surveyors general, of date February 22nd, 1855.

No. 36. Model and the parts thereof showing profiles of mountains near initial corner.

No. 37. Plat of profiles on natural and exaggerated scale prepared by Mr. Duval.

No. 38. Plat of profiles on exaggerated scale prepared by Mr. Duval.

No. 39. Map of Baca Grant No. 4, showing mountains at northeast corner as determined by the witness Darby.

181 No. 40. Hayden's geological and topographical map for part of Colorado.

No. 41. Official map of Colorado for the year 1892.

And it was ordered by the court that said originals should be certified to the said circuit court of appeals in lieu of inserting copies thereof in the record.

And inasmuch as the foregoing matters do not otherwise sufficiently appear of record, the plaintiff now here tenders this his bill

of exceptions, and prays that the same may be signed, sealed and made a part of the record; which is done accordingly this first day of June, A. D. 1895.

[SEAL.]

MOSES HALLETT,
Dist. Judge.

Indorsed: 2978. Quincy A. Shaw *vs.* Murray M. Kellogg. Bill of exceptions. Filed Jun- 1, 1895. Robert Bailey, clerk.

UNITED STATES OF AMERICA, }
Eighth Circuit. }

Assignment of Errors.

In the Circuit Court of Appeals.

QUINCY A. SHAW, Plaintiff in Error, }
vs.
MURRAY M. KELLOGG, Defendant in Error. }

The plaintiff in error, who was plaintiff in the court below, says there is manifest error in the judgment and proceedings of the court below in this cause, in this, to wit:

1. The court erred in sustaining the motion of the defendant that the jury be directed to return a verdict in defendant's favor, to which ruling of the court the plaintiff at the time excepted.

2. The court erred in directing the jury to return a verdict for the defendant, to which direction of the court the plaintiff at the time excepted.

3. The court erred in its instructions to the jury in this: That having instructed the jury that if the officers of the Land Department at Washington had passed upon the conclusiveness of the grant, and had declared in terms that the land was not mineral, this determination might be binding as against subsequent claimants, the court further instructed the jury as follows: "It
182 seems, upon an examination of the testimony which has been offered to you, that no such determination was made;" to which last instruction of the court so given to the jury the plaintiff at the time excepted.

4. The court erred in instructing the jury as follows: "The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notice of survey, expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral;" to which instruction of the court the plaintiff at the time excepted.

5. The court erred in his instructions to the jury, in this, to wit: that after having stated to the jury as follows: "The instruction of the Commissioner of the General Land Office, as found in a letter of the surveyor general of Colorado of date February 12th, 1864, is that he will be authorized to approve the plat upon finding it to be correct, in the usual way, and the Commissioner adds: 'In your certificate of approval you will add the special reservation stipulated by this statute, but not to embrace mineral land nor to interfere with any

other vested rights, if such exist,'" the court then further instructed the jury as follows: "That is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land;" to which last instruction of the court the plaintiff at the time excepted.

6. The court erred in his instructions to the jury in the following statement, to wit: "The Commissioner of the General Land Office, apparently, expressly declining to decide the question whether the land selected was or was not of that character," to which statement so given in his instructions to the jury the plaintiff at the time excepted.

7. The court erred in his instructions to the jury in this: That after stating, "It is true that the surveyor general did not put these words in his approval. In the approval which he in fact made he said that it was subject to the provisions of the act of June 21st, 1860," the court then further instructed the jury as follows: "Taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval," to which last statement of the court so given in his instructions to the jury the plaintiff at the time excepted.

8. The court erred in his instructions to the jury in the following statement, to wit: "So that I feel bound to say that the ap-
183 proval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner," to which instruction the plaintiff at the time excepted.

9. The court further erred in giving to the jury the following instruction, to wit: "And if this be the correct construction of the papers and documents, and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department, in the way of declaring what the force and effect of the approval might be, would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made," to which instruction of the court the plaintiff at the time excepted.

10. The court erred in his instructions to the jury in this, to wit: That after having stated to the jury as follows: "There are several communications from the department to persons who were more or less interested in the tract, or who assumed to have some interest in it, in which the Commissioner, or some one connected with the department, assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey," the court then further instructed the jury as follows: "I cannot give to these communications any effect whatever;" to which last statement and conclusion of the court so given in his instructions to the jury the plaintiff at the time excepted.

11. The court erred in instructing the jury as follows: "We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office, or to give it any other effect than that which it appears to have from the letter of February 12th,

1864;" to which instruction of the court the plaintiff at the time excepted.

12. The court further erred in instructing the jury as follows: "Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in the case, that the act of June 21, 1860, and what was done under that act from time to time, did not vest in the grantees of Luis Maria Baca, and their successors in interest, the mineral lands which may be within the tract located;" to which instruction of the court to the jury the plaintiff at the time excepted.

13. The court further erred in instructing the jury as follows: "The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant, and which he claims as a mine, is embraced in the grant to the heirs of Luis Maria Baca, there is of course nothing left for you to do but return a verdict upon the testimony for the defendant in the suit;" to which instruction of the court and each part thereof the plaintiff at the time excepted.

184 14. The court erred in permitting the jury to return and in receiving a verdict in favor of, the defendant; to which action of the court the plaintiff at the time excepted.

15. The court erred in entering judgment in this cause in favor of the defendant; to which action of the court the plaintiff at the time excepted.

For which errors the plaintiff in error prays that the judgment of the court below be in all things reversed.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Attorneys for Plaintiff in Error.

(Indorsed:) No. 2978. U. S. circuit court of appeals, eighth circuit. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, defendant in error. Assignment of errors. Filed Jun- 14, 1895. Robert Bailey, clerk. Wolcott & Vaile, att'ys for pl'ff in error.

6-12/'95.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents, that we, Samuel N. Wood and Henry R. Wolcott are held and firmly bound unto Murray M. Kellogg in the full and just sum of five hundred dollars, to be paid to the said Murray M. Kellogg, his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifteenth day of June in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at the May term A. D. 1895, of the circuit court of the United States, for the district of Colorado, in a suit pending in said court between Quincy A. Shaw, plaintiff, and Murray M. Kellogg, defendant, judgment was rendered against the said plaintiff,

Quincy A. Shaw and the said Quincy A. Shaw having obtained a writ of error to the United States circuit court of appeals, for the eighth circuit, to reverse the judgment of said court, and a citation directed to the said Murray M. Kellogg citing and admonishing him to be and appear, in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Quincy A. Shaw shall prosecute said writ of error to effect and answer all damages and costs, if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

185 SAMUEL N. WOOD. [SEAL.]
HENRY R. WOLCOTT. [SEAL.]

Sealed and delivered in presence of—
J. F. VAILE.

Approved June 15th, 1895.

MOSES HALLETT, *Judge.*

Justification.

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss:

Samuel N. Wood and Henry R. Wolcott, sureties on the within bond, being each first duly sworn, deposes and saith he is worth in —— the sum below set opposite his name, that is to say:

As to S. N. Wood more than one thousand dollars;

As to Henry R. Wolcott more than one thousand dollars, over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

SAMUEL N. WOOD.
HENRY R. WOLCOTT.

Subscribed and sworn to before me, at Denver, this 15th day of June, A. D. 1895.

[SEAL.] COLIN A. CHISHOLM,
Notary Public.

My commission expires July 10th, 1895.

(Indorsed:) Gen. No. 2978. Circuit court of the United States, district of Colorado. Quincy A. Shaw *vs.* Murray M. Kellogg. Bond on appeal, $5,000. Filed this 18th day of June, A. D. 1895. Robert Bailey, clerk.

10255

Writ of Error to the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the May term, 1895, thereof, between Quincy A. Shaw, plaintiff, and Murray M. Kellogg, defendant, a manifest error hath happened, to the great damage of the said Quincy A. Shaw, plaintiff in
186 said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the first day of August, 1895, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of June, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the 119th year. Issued at office in Denver, in said district, with the seal of the circuit court of the United States for the district of Colorado, and dated as aforesaid.

Seal United States Circuit Court, District of Colorado.

ROBERT BAILEY,
Clerk Circuit Court United States, District of Colorado.

Allowed by—
MOSES HALLETT, *Judge.*

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable, the United States circuit court of appeals

a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court of the United States for the district of Colorado, at Denver, in said district, this 19th day of June, 1895.

ROBERT BAILEY, *Clerk*,
By CHARLES W. BISHOP,
Deputy Clerk.

187 DISTRICT OF COLORADO, *ss*:

The plaintiff in error, having served this writ, by lodging a copy thereof in the clerk's office where the record remains, and having given the security required by law, on the issuing of this citation, within the time required by law, this writ — therefore a supersedeas.

Seal United States Circuit Court, District of Colorado.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court of the United States, for the district of Colorado, at Denver, in said district, this — day of ——, A. D. 189–.

—— ——, *Clerk.*

Gen. No. 2978. United States circuit court of appeals, eighth circuit. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, defendant in error. Writ of error to circuit court U. S., district of Colorado. Filed in United States circuit court, district of Colorado, this 18th day of June, A. D. 1895. Robert Bailey, clerk. Wolcott & Vaile, attorney- for plaintiff in error.

Citation.

United States Circuit Court of Appeals.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to Murray M. Kellogg, Greeting:

You are hereby cited and admonished to be and appear, in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the district of Colorado, sitting at Denver, in said district, wherein Quincy A. Shaw is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 15th day of June, in the year of our Lord one thousand eight hundred and ninety-five.

MOSES HALLETT,
Judge of Circuit Court.

188 *Proof of Service.*

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Service of the within citation is hereby acknowledged for and on behalf of Murray M. Kellogg, defendant in error within named, this 15th day of June, A. D. 1895.

JOHN R. SMITH,
Att'y for Def't in Error, Murray M. Kellogg.

P. O. address, 415 Charles bldg., Denver, Colo.

Gen. No. 2978. United States circuit court of appeals, eighth circuit. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, defendant in error. Citation. Filed in United States circuit court for the district of Colorado, this 18th day of June, A. D. 1895. Robert Bailey, clerk. Wolcott & Vaile, attorney- for plaintiff in error.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from No. 1 to No. 284, both inclusive, to be a true, perfect and complete transcript and copy of the record and proceedings and of all thereof heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein Quincy A. Shaw was plaintiff and Murray M. Kellogg was defendant, as fully and completely as the same still remain on file or of record in my office, at Denver.

Seal United States Circuit Court, District of Colorado

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 19th day of June, A. D. 1895.

ROBERT BAILEY, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

Filed Jun- 22, 1895.

JOHN D. JORDAN, *Clerk.*

189 (*Appearance for Defendant in Error.*)

And on the twenty-second day of June, A. D. 1895, an appearance of counsel for defendant in error was filed in the office of the clerk of said circuit court of appeals in said cause in the words and figures following:

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In the Circuit Court of Appeals for the Eighth Circuit.

In re QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error. } No. 664.

I do hereby certify that I have been retained by and appear in the above-entitled cause for and in behalf of Murray M. Kellogg, the defendant in error above named.

JOHN R. SMITH,
Att'y for M. M. Kellogg, Def't in Error.

Dated at Denver, Colorado, this 15 day of June, A. D. 1895.
Address: 415 Charles bldg., Denver, Col.

Endorsed: No. 664. *In re* Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, defendant in error. Appearance of defendant in error. Filed Jun- 22, 1895. John D. Jordan, clerk. John R. Smith, Denver, Col., counsel for def't in error.

(*Appearance for Plaintiff in Error.*)

And on the twenty-sixth day of June, A. D. 1895, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

190 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG. } No. 664.

The clerk will enter my appearance as counsel for the plaintiff in error.

JOEL F. VAILE.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 664. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Appearance. Filed Jun- 26, 1895. John D. Jordan, clerk. Joel F. Vaile, Denver, Col., counsel for pl'ff in error.

(*Order of Argument.*)

And on the thirteenth day of January, A. D. 1896, in the record of the proceedings of said circuit court of appeals is an order of argument in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1895.

MONDAY, *January* 13, 1896.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error. } No. 664.

In error to the circuit court of the United States for the district of Colorado.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Joel F. Vaile, in behalf of the plaintiff in error, and continued by Mr. John R. Smith, for the defendant in error; but, not being concluded at the hour of adjournment, further argument was postponed until tomorrow morning.

191 (*Order of Submission.*)

And on the fourteenth day of January, A. D. 1896, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1895.

TUESDAY, *January* 14, 1896.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error. } No. 664.

In error to the circuit court of the United States for the district of Colorado.

This cause, having been called this day for further hearing, argument was continued by Mr. John R. Smith and Mr. Murray M. Kellogg, for the defendant in error, and concluded by Mr. Joel F. Vaile, for the plaintiff in error; thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Order to Certify Questions.*)

And on the thirtieth day of March, A. D. 1896, in the record of the proceedings of said circuit court of appeals is in order to certify certain questions to the Supreme Court of the United States in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1895.

MONDAY, *March* 30, 1896.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error. } No. 664.

In error to the circuit court of the United States for the district of Colorado.

In this cause it is now here ordered that certain questions arising upon the record be, and the same are hereby, ordered to be certified to the Supreme Court of the United States under the provisions of section six of the act of March 3, 1891, for the instruction of the said Supreme Court upon said questions.

192 (*Certificate of Questions.*)

And on the thirtieth day of March, A. D. 1896, a certificate of questions to the Supreme Court of the United States was filed in the office of the clerk of said circuit court of appeals in said cause in the words and figures following:

193 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1895.

QUINCY A. SHAW, Plaintiff in Error, *vs.* MURRAY M. KELLOGG, Defendant in Error.	No. 664. In Error to the Circuit Court of the United States for the District of Colorado.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this 30th day of March, A. D. 1896, hereby certifies that upon the record on file in said court in the case wherein Quincy A. Shaw is plaintiff in error and Murray M. Kellogg is defendant in error, and which cause is now pending before this court upon a writ of error duly sued out to review the judgment in favor of the defendant in error which was rendered by the United States circuit court for the district of Colorado, the following facts are made to appear:

1. Quincy A. Shaw, the plaintiff in error, brought an action of ejectment in the circuit court for the district of Colorado against Murray M. Kellogg for the possession and title to the following specifically described premises, situated within the outer boundaries of Baca Grant No. 4, to wit: Section twenty-two (22), township one (1) north, — one (1) east, according to the plat of said Baca Grant No. 4 as filed and recorded in the office of the county clerk and recorder of said Saguache county, in the State of Colorado, including in said section twenty-two certain mineral-bearing property desig-

nated by the defendant as the Eastern Star mine, and other mining lands adjacent thereto within said section twenty-two.

2. The plaintiff alleged in his complaint that the amount in controversy was more then two thousand dollars; that he was the owner of Baca Grant No. 4 and entitled to the possession of all thereof, including the said section twenty-two; that the defendant had entered upon and ousted him from the possession thereof and still unlawfully withheld the same; that the matter in dispute in this action arises under an act of Congress entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860; that the plaintiff claims that by virtue of said act and the finding of the surveyor general as to the non-mineral character of said land the title to the premises in dispute vested in the heirs of Luis Maria Baca and through them in the plaintiff, although subsequent discoveries of precious metals were made upon the lands here in controversy; while the defendant, on the other hand, claims that under the proper construction of said act of Congress and the finding of the surveyor general the subsequent discovery of precious metals upon the premises in controversy excluded the same from the grant made under said act.

3. The defendant answered. In his answer he denied that the plaintiff was the owner of the section twenty-two described in the complaint or of the mine situated thereon or any of the ad-
194 jacent mining property thereon, or that he was entitled to the possession thereof. He denied that the location of the lands in controversy under said act of Congress was ever approved by the proper officers of the Land Department of the United States, or that the surveyor general of Colorado was authorized to or did certify that the lands in dispute were non-mineral, and he alleged that at the time of their location they were known to be mineral lands.

He averred that on April 24, 1876, the land in dispute, where the Eastern Star mine is now located, was unappropriated public mineral land of the United States, and as such was subject to exploration and location; that thereupon the grantors of the defendant discovered a vein of quartz bearing gold and silver thereon, and thereupon took possession thereof and duly located their mining claim thereon; that they and their successors in interest have performed annually from that time until said answer was filed the requisite labor and made the necessary improvements to entitle them to the possession and ownership of said mining claim and the premises in dispute under and pursuant to the mining laws of the United States.

The plaintiff filed a replication to this answer.

4. The case proceeded to trial before the court and a jury and the plaintiff introduced evidence in support of the allegations of his complaint and rested his case. When he closed his evidence the following facts stood admitted by the pleadings or had been proved by the evidence which he had introduced:

A. The land in controversy in this suit was worth more than two thousand dollars and was mineral land, but there was no proof that

it was known to be such prior to A. D. 1876, and it was within the limits of Baca Grant No. 4.

B. The act of Congress entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860 (12 Stat., 72), contained the following section:

"SEC. 6. And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer."

C. Under this section the action indicated by the following communications and certificates was taken by the Commissioner of the General Land Office and the surveyors general of New Mexico and Colorado respectively:

195 "SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, NEW MEXICO, *December 8th*, 1860.

"Hon. Thomas Cabeza de Baca, legal representative of the heirs of Don Luis Maria Baca, dec'd.

"SIR: I hereby certify that the grant to the town of Las Vegas has been surveyed under instructions from this office, and according to the laws of the United States, and that the acres of said tract of land *is* 496,446.96 acres.

"Under the act of Congress approved June 21st, 1860 (see Statutes at Large, page 71), the heirs of Luis Maria Baca are entitled to select in not more than five square bodies, the amount of land equal to said area, upon any of the unoccupied lands, not mineral, of New Mexico, and the surveyor general is authorized to survey and locate the same. Therefore I notify you that this office is ready to cooperate with you and receive your application for the location of the lands granted by the Government.

"A. P. WILBAR,
"*Surveyor General of New Mexico.*"

"SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, NEW MEXICO, *December 8th*, 1860.

"SIR: Enclosed please find duplicate of the certificate in regard to the Las Vegas grant issued from this office to the legal representatives of the heirs of Luis Maria Baca.

"Yours very respectfully, A. P. WOLBAR,
"*Surveyor General.*

"Hon. Jos. S. Wilson, Com'r Gen'l Land Office."

"SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, *February 9th*, 1863.

"SIR: Please find enclosed herewith the application of the heirs of Luis Maria Baca, to locate one-fifth of the private claim confirmed to them under the act of Congress approved June 21, 1860. The location falls within the Territory of Colorado, but within the limits of New Mexico as they existed at the date of the approval of the act confirming this claim.

"I have transmitted a copy of the enclosed to the surveyor general of Colorado, to enable him, when required to make the survey.

"I am very respectfully, your ob't serv't,

"JOHN A. CLARK,
"*Surveyor General of New Mexico.*

"Hon. J. M. Edmunds, Com'r of General Land Office, Washington city, D. C."

"SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, NEW MEXICO, *February 5th*, 1863.

"I, John A. Clark, surveyor general of New Mexico, do hereby certify that on this day John S. Watts, Esq., in behalf of the heirs of Luis Maria Cabeza de Baca, filed in this office an application in the words and figures following, viz:

196 "'SANTA FÉ, NEW MEXICO, *December 12th*, 1862.

To Surveyor General John A. Clark, surveyor general of New Mexico:

I, John S. Watts, attorney of the heirs of Luis Maria Baca, have this day selected as one of the five locations, belonging to the said heirs, under the 6th section of the act of Congress approved June 21st, 1860, a tract of land in the Territory of New Mexico, described as follows:

Beginning at a point on the eastern edge of the valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the snowy range, dividing the waters of the Rivers Arkansas and Del Norte, thence east along said parallel four and one-half miles, thence south along a meridian line twelve miles, thirty-six chains and forty-four links distance, thence west at a right angle twelve miles thirty-six chains and forty-four links distance, thence north to the said specified parallel of latitude, thence east with said parallel to the place of beginning.

I further state that the said land is entirely vacant, not claimed by any one, is not mineral, but located for purposes of arable and pastoral agriculture, and is within the limits of the Territory of New Mexico as established in the organic act. I hereby accordingly make application for the survey and location of the tract of land in accordance with the provisions of the above act of Congress.

JOHN S. WATTS,
Attorney for Heirs of Luis Maria Baca.'

"And I further certify that the said tract of land being the one-fifth part of the private claim confirmed to said heirs, contains

ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine hundredths of an acre, and that this location is the fourth of the series, and with the three locations heretofore made, numbered one, two & three, includes four-fifths of the said private claim confirmed to the heirs of Luis Maria Cabeza de Baca by the act of Congress approved June 21, 1860.

"In witness whereof I have hereunto set my name this fifth day of February, A. D. 1863.

"JOHN A. CLARK,
"*Surveyor General of New Mexico.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, Co. Ty., *Feb'y 24th*, 1863.

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

"SIR: I have the honor to report that I have this day received from the surveyor general of New Mexico a copy of the application of the att'y of the heirs of Luis Maria Baca for the location of one of the five locations belonging to said heirs under the act of June 21st, 1860, dated December 12th, 1862. The description of the tract selected is as follows: 'Beginning at a point (?) on the eastern edge of the valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the snowy range dividing the
197 waters of * * * the River- Arkansas and Del Norte, thence east along said parallel four and one-half miles, thence south along a meridian line twelve miles, thirty-six chains and forty four links distance, thence west at a right angle twelve miles, thirty-six chains and forty-four links distance, thence north to the said specified parallel of latitude, thence east with said parallel to the place of beginning.'

"I suppose this selection has been made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca 'floats' and should locate it as this is located for the reason that, in his opinion, it would cover rich minerals in the mountains.

"Very truly yours ob't serv't,

"FRANCIS M. CASE,
"*Surv. Gen'l Colo. & Utah.*"

"GENERAL LAND OFFICE, *March 13th*, 1863.

"Surveyor general, Colorado and Utah, Denver city, Colorado Ty.

"SIR: I am in receipt of your communication dated the 24th of February last, reporting that you have received from the surveyor general of New Mexico a copy of the application of the attorney of the heirs of Luis Maria Baca for the location of one-fifth of the private claim confirmed to said heirs, the location being within the limits of New Mexico as they existed at the date of the confirmation, but falling within what is now the Territory of Colorado.

"It is necessary before the application can be approved by this office that it be accompanied by the certificates of the surveyor general and the register & receiver that the land selected is vacant and

not mineral. This is in accordance with our instructions to the surveyor general of New Mexico, extracts from which were furnished your office in our communication of June 7th, 1862, especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do, you will transmit to this office your official certificate setting forth these facts.

"You will also correspond with the register and receiver of Colorado when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which, when received, you will forward to this office.

"Very respectfully, your ob't serv't,

"JOS. S. WILSON,
"*Acting Commissioner.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Oct. 13th*, 1863.

"SIR: On the 3d day of October of the present year William Gilpin, as representative of the heirs of Luis Maria Baca, filed in this office an application for the survey of Grant No. 4 of the grants confirmed *by* the said heirs by act of Congress of June 21st, 1860, a copy of which application is herewith submitted. 198

"Mr. Gilpin further represented that he was desirous of taking immediate possession and improving the said grant, and that to do so it would be necessary to have the survey made during the next six weeks to avoid the deep snow which would render the survey impossible.

"I informed him that the instructions in this office forbid making the survey of any grant situated more than six miles from existing lines of public surveys, but as his grant was in a part of the country which it would probably be some time before the lines of survey would reach I would order the survey and make a contract subject to your approval. A copy of my reply to his application is herewith submitted.

"As there is yet no United States depository in operation in this country, Mr. Gilpin deposited the money with me and took my receipt for the same, a copy of which receipt is herewith enclosed. The money is in my hands subject to your order as to the disposition of it, but in case of the non-approval of the contract, the money was to remain in my hands until the survey was finished and to be paid to the deputy for the work done, the survey being considered private and not official. This was done in order to secure myself and the deputy, as Mr. Gilpin wished the deputy to take the field immediately.

"I transmit herewith the copy of a contract made with Deputy

Surveyor A. Z. Sheldon for the survey of the above-mentioned grant and also my instructions to said deputy. I have acted in this matter as in my judgment seemed best under the circumstances, and hope it will meet your approval.

"Very respectfully, your ob't serv't,

"JOHN PIERCE,

"*Surveyor General of Colorado and Utah.*

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C."

"GENERAL LAND OFFICE, *November 2nd*, 1863.

"John Pierce, Esq., surveyor general, Denver, Col. Ter.

"SIR: In reply to your communication of the 12th ultimo covering contract—instructions and contract—with Deputy Surveyor A. Z. Sheldon for the survey of Grant No. 4 of the Baca heirs, I have to say this office cannot approve said contract. In your letter dated the 10th March last, transmitting the application of the attorney of said heirs for the location of this claim, you say, 'I suppose this selection is being made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca floats and should locate it as this is located, for the reason that in his opinion, it would cover rich minerals in the mountains.'

"Upon receipt of your letter you were expressly informed, under date of the 13th March, 1860, that before the application
199 could be approved it must be accompanied by the certificates of the surveyor general and the register and receiver that the land is vacant and not mineral, and I then took occasion to communicate the following explicit instructions: 'Especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Gov. Gilpin, which you communicate in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in the selection are vacant and not mineral, to enable you to do so you will transmit to this office your official certificate setting forth these facts.'

"In our communication of the 7th June, 1862, you were also furnished with extracts from our instructions to the surveyor general of New Mexico, referring to the location of these claims, in which it was plainly indicated that should selections be made outside of the existing surveys, the survey thereof must be postponed until the vicinity is reached by the regular progress of the public surveys. You will be guided in your official acts by our instructions, which are full and explicit in relation to the location of the claims referred to. The contract and instructions for the survey of the above-mentioned claim are herewith returned.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,

"*Commissioner.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Dec. 12th*, 1863.

"SIR: I have the honor to acknowledge the receipt of your letter of the 2nd of Nov. last, disapproving of the contract for the survey of Grant No. 4 of the floats belonging to the heirs of Luis Maria Baca.

"I herewith transmit my certificate that the lands are 'not mineral and are vacant.' You refer to a letter of the former surv. gen'l of this district, in which he says that he supposes that this location was made by Mr. Gilpin, 'for the reason that, in his opinion, it would cover rich mineral lands.' I do not believe that at the time Mr. Case wrote that letter he had the least idea that the float as located covered any mineral lands. I have signed the accompanying certificate partly from my own knowledge of the country, but mostly from the following reasons:

"1st. The discoveries of gold thus far go to show that the gold lands of Colorado commence at the base of Long's peak and extend in a course about 30° west of south to the head-waters of the San Juan, covering a belt of country about 30 miles in width, of which the line indicated will be near the western boundary; outside of this no gold or silver lodes have been discovered.

"2nd. The grant is located on the great line of travel between Denver and Santa Fé, and thousands of experienced miners have been travelling *of* the Sangre de Christo and Mosca passes and have found no gold or other valuable minerals.

"3rd. In the summer of 1860 a party of one hundred and
200 fifty miners from here, under one Roeder, went to the San Luis valley and prospected the whole of the Sangre de Christo range, but found no gold anywhere on the eastern run of the park. Many of the men who were in this expedition have been in my employ, and from them I have had this history of the expedition.

"Such are the grounds on which I have signed the certificate, and to me they are satisfactory.

"The survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessible at any time of the year.

"I have refunded to Mr. Gilpin the money placed in my hands, and he has paid for the survey as a private survey, though he has permitted me to make an abstract of the field-notes, which I have placed on file in this office.

"Your letter of November 16th, granting me a leave of absence, is also received. The cold weather has so protracted the surveys that I cannot avail myself of it, though it is possible that I may wish to visit the States some time during the winter or spring.

"Very truly, your ob't serv't, JOHN PIERCE,
"*Surv. Gen'l of Colorado & Utah.*

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington D. C."

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Dec. 5th*, 1863.

"SIR: This is to certify that from good and sufficient evidence I am perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

"Very truly, your ob't serv't, JOHN PIERCE,
"*Surveyor General of Colorado and Utah.*"

"GENERAL LAND OFFICE, *January 16th*, 1864.

"John Pierce, Esq., surveyor general, Denver city, C. T.

"SIR: Your letter of the 14th Dec. last, with inclosed certificate relating to the 4th location of the Baca heirs, is received.

"The act of 21st of June, 1860, confirming the claim of Luis Maria Baca, authorized the heirs of said Baca to select in lieu of the tract claimed by the town of Las Vegas an equal quantity of vacant land not mineral. With a view to carry out the requirements of the law, the surveyor general of Colorado was required in our instructions of June 7th, 1862, to accompany the final rendition of the certificate with his own statement, and also that of the register and receiver setting forth the fact that the land selected is vacant and not mineral. Those instructions were reiterated in our letter of March 13th, 1863.

"The evidence furnished by you is not sufficient, in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral deposits. Your certificate is not based upon
201 actual knowledge of the facts, but upon the information and conclusions deduced from reasoning. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of ex-Governor Gilpin, officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.

"The statement of the register and receiver, required in our instructions, is also wanting.

"The approval of the selection will stand suspended until some satisfactory proof is obtained upon the points indicated.

"Very respectfully, your ob't serv't,
"J. M. EDMUNDS,
"*Commissioner.*"

"GENERAL LAND OFFICE, *February* 12, 1864.

"John Pierce, Esq., surveyor general, Denver city, Colo.

"SIR: I have considered your report of the 14th December last respecting the survey made in November, 1863, by Deputy Surveyor Albinus Z. Sheldon, of what is known as the Luis Maria Baca float, in San Luis park, in Colorado, and containing 92,293 acres.

"You transmit your certificate 'that the lands are not mineral and are vacant,' and state under specific heads 'the grounds on

which' you 'have signed the certificate' and which are satisfactory to you. You report further that 'the survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessible at any time of the year.'

"The act of Congress approved 21st June, 1860, U. S. Statutes at Large, vol. 12, page 71, chap. 167, confers authority for the location of the said Baca float in the then Territory of New Mexico, but now a part of Colorado Territory.

"The said statute makes it the 'duty of the surveyor general of New Mexico,' now in your jurisdiction, 'to make survey and location of the lands so selected by the heirs of Baca when thereunto required by them,' with a proviso making a three years' limitation to the statute.

"You further report that you have refunded to Mr. Gilpin the money placed in your 'hands and he has paid for the survey as a private survey, though he has permitted' you 'to make an abstract of the field-notes which' you 'have placed on file in' the surveyor general's office.

"This part of the proceedings is irregular. Under statutory requirements it is obligatory upon private claimants to pay for the survey of confirmed private claims, but the work must be done under the usual obligations and responsibilities both of deputies & surveyor general.

"The difficulty, however, may be avoided by pursuing the following course: The original field-notes, duly verified and
202 authenticated, must be filed in the surveyor general's office of Colorado upon bringing these to the usual satisfactory tests, and finding the same all regular and correct you are authorized in virtue of the aforesaid 6th section of the said act of 21st June, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights if such exist.

"The statute does not order the issue of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will therefore constitute the evidence of title.

"You will take care so to arrange the matter that hereafter when in the gradual progress of the lines of the public surveys, they shall reach the Baca location they shall be properly connected therewith and so appear on the township plats.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

"GENERAL LAND OFFICE, *Feb'y 26th*, 1864.

"John Pearce, Esq., surveyor general, Denver city, Colorado T.

"SIR: At the request of Wm. Gilpin, Esq., I herewith transmit the following papers, to wit:

"First. Mr. Gilpin's application for the survey of Grant No. 4 of the heirs of Baca, dated Oct. 3rd, 1863.

"Second. Surveyor general's estimate of the cost of said survey, dated October 5th, 1863.

"Third. Surveyor general's receipt for $600, deposited by Mr. Gilpin to pay for the above survey, October 6th, 1863.

"Fourth. Certificate of the register and receiver at Golden city, Colorado, that the lands covered by the said Grant No. 4 are not mineral and are vacant, December 5th, 1863.

"Fifth. The field-notes of the boundary lines of the above grant, together with plat thereof.

"These papers were deposited in this office by Mr. Gilpin and are transmitted to you for such action as you shall deem proper in the premises in accordance with the views expressed in our communication to you, dated the 12th instant.

"Very respectfully, your obedient servant,

"J. N. EDMUNDS,
"*Commissioner.*"

"COLORADO TERRITORY, GOLDEN CITY, *Dec. 5th*, 1863.

"SIR: This is to certify that from good and sufficient evidence we are perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their grant, No. 4, in the San Luis valley, and marked out a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

"G. N. CHILCOTT,
"*Register Land Office, Colo. Dist.*
"C. B. CLEMENTS,
"*Receiver Land Office, Colo. Ty.*"

203 "SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *March 29th*, 1864.

"SIR: I have the honor to acknowledge the receipt of your letter of Feb'y 26th, enclosing field-notes and papers in regard to the survey of Grant No. 4 of the heirs of Luis Maria Baca.

"I herewith enclose transcript of field-notes & plat of said survey. I have furnished ex-Gov. Gilpin with one copy of the plat and retained one in the office.

"Very respectfully, your ob't serv't,

"JOHN PIERCE,
"*Surveyor General of Colorado & Utah.*"

The transcript of the field-notes referred to in the last letter contained the following and no other references to the mineral or non-mineral character of the lands contained in Baca Grant No. 4, viz: "Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle set forth in the notes," and it was accompanied with the following certificate:

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *March 15th*, 1864.

"The foregoing field-notes of the survey of Grant No. 4, heirs of Luis Maria Baca, executed by Albinus Z. Sheldon, under his con-

tract of the 7th day of October, 1863, having been critically examined, the necessary corrections and explanations made, the said field-notes and the survey they describe are hereby approved.

"JOHN PIERCE,
"*Surveyor General of Colorado and Utah.*"

The transcript of the survey referred to in the last letter had the following certificate indorsed thereon:

"The above map of the boundary lines of Grant No. 4, of the heirs of Luis Maria Baca, in San Luis valley, Colorado Territory, as surveyed by Albinus Z. Sheldon, under his contract bearing date the 7th day of October, 1863, is strictly conformable to the field-notes on file in this office, which have been examined and approved, subject to the conditions and provisions of sec. 6 of the act of Congress approved June 21st, 1860.

"Surveyor general's office, Denver, March 18th, 1864.

"JOHN PIERCE,
"*Sur. Gen'l Colo. & Utah.*"

"GENERAL LAND OFFICE, *May 4th*, 1864.

"John Pierce, Esq., surveyor general, Denver city, C. T.

"SIR: Your letter of March 29th last, transmitting transcript & field-notes of the survey of Grant No. 4, of the heirs of Luis Maria Baca, has been received at this office.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

204 "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *January* 14, 1868.

"Hon. J. S. Watts, present.

"SIR: Referring to your application of the 12th inst. for the issuing of patent for the tract of land in Colorado known as 'Baca Tract No. 4,' I have to state that the selection authorized by the 6th section of the act of 21st June, 1860 (Stats., vol. 12, page 72), has been made, and the survey executed and reported to this office; but as no provision is made in the statute for the issuing of patent, the survey and statute are the only authorized evidences of title, this office having no authority to issue patents unless the statute expressly orders the same, which is not done in the Baca case; but 'that a grant may be made by a law as well as a patent pursuant to a law is undoubted (6 Cr., 128). A confirmation by a law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*.' (12 Peters' Reports of the Decisions of the Supreme Court of the United States, page 454.)

"Very respectfully, your ob't serv't,

"JOS. S. WILSON,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *M'ch 21st*, 1879.

"Mr. Wm. L. Campbell, surveyor gen'l of Colorado.

"SIR: I have considered the application of Hon. Wm. Gilpin for a patent to the tract of land known as Baca Claim No. 4, in Colorado.

"Section six of the act of Congress approved June 21, 1860, provided that the heirs of Luis Maria Baca might select a quantity of land equal to that claimed by the town of Las Vegas, to be located on vacant non-mineral land in New Mexico, in square bodies not to exceed five in number, the same when selected by the heirs to be surveyed and located by the surveyor general of New Mexico.

"It was subsequently ascertained that the quantity of land claimed by the town of Las Vegas, and therefore the amount to be selected by the Baca heirs, was 496,446.96 acres.

"In 1863 the Baca heirs selected the land now in question. This was the fourth tract, three having been previously selected, and therefore this tract was designated as Baca Claim No. 4. It contains 99,289.39 acres being one-fifth of the amount granted to said heirs.

"This was at the time of its selection in the Territory of Colorado; but at the date of the act making the grant, June 21, 1860, the tract was a part of the Territory of New Mexico.

"After the selection of this tract it was surveyed and located by the surveyor general of Colorado, he having first determined that the land was vacant and non-mineral.

"The seventeenth section of the act of Congress approved Feb. 28, 1861, gave the surveyor general of Colorado the same
205 authority concerning the location of this tract as was originally conferred on the surveyor general of New Mexico.

"After the selection, but previous to the location, the Commissioner of the General Land Office instructed the surveyor general of Colorado that as the statute did not authorize the issuing of a patent, the act of June 21, 1860, and the plat approved by the surveyor general would constitute the evidence of title.

"There is no doubt that Government may convey and vest the legal title without issuing a patent as effectually as may be done by a patent. Larriviere *v.* Madegan, 1 Dillon, 455; Gregnon *v.* Aster, 2 Howard, 319; 3 Opinions of Att'y Gen., 350.

"The surveyor general was authorized by the act to locate only vacant non-mineral land. Unless the contrary appeared, it would be presumed from the act of locating that the surveyor general determined the land was not mineral.

"It is now alleged that the land is mineral; that the surveyor general approved the plat of survey 'subject to the conditions and provisions of section six of the act of Congress approved June 21, 1860,' and that, therefore, the grantees cannot hold the land under that act.

"The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be

on land determined at the time of such location, when the title passed, to be non-mineral land.

"The act did not intend that if, at any subsequent time in the remote future, mineral should be discovered the title should be unsettled or that the title should be the subject of controversy through all time, as often as any one might choose to allege its mineral character.

"The surveyor general did not undertake and had no power to impose conditions not in the act.

"If, after fifteen years, the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years? If the question may be reopened as to the land granted under the provisions of the act of June 21, 1860, why may it not as to land acquired under the homestead, pre-emption, and other acts of Congress? Would such titles ever be considered secure?

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority. The title has passed from the Government and vested in private individuals. This office has no authority to reopen the question. The land cannot longer be regarded as a part of the public domain.

"Mr. Gilpin, who claims this tract of land as the assignee of the Baca heirs, makes personal application for a patent. It is not claimed that the granting act authorized a patent to issue, but that it is authorized by section two of the act approved March 3, 1869 (15 Stat., 342), and by sec. 2447, Rev. Stat. U. S.; but those provisions authorize patent to issue only when claims to land have been confirmed by law—that is, where an act of Congress recognizes a claim to specific land—and does not apply to cases
206 where the acts of Congress only authorize a claim to be made thereafter to land without regard to any specific tract or parcel of land. This office can issue patents only where it is authorized by some act of Congress. The application of Mr. Gilpin for a patent must therefore be refused.

"Very respectfully, J. A. WILLIAMSON,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *June 28th*, 1884.

"W. Niel Dennison, Esq., Cañon City, Colorado.

"SIR: I have received, by reference from the department, your letter of June 12th inst., addressed to the Hon. Secretary of the Interior, relating to the Baca location No. 4 ("Gilpin grant"), in which you inquire, 1st, if said grant is located on mineral or non-mineral land, and, 2nd, if prospectors will be allowed to hold any mineral discoveries made on said No. 4 prior to the year 1880.

"In reply to said inquiries I have to say that by the 6th section of the act of June 21, 1860 (12 Stat., 71), the heirs of Baca were authorized to select the quantity of land awarded to them, in not more

than five square bodies, upon vacant non-mineral land, and it was made the duty of surveyor general to make survey and location of the land selected, of course subject to the conditions imposed as to the character of the land awarded.

"In the case of location No. 4, in question, the surveyor general, having first ascertained and determined that the land selected was vacant and non-mineral, surveyed and located it, and approved the plat of the location March 18, 1864, and this approved plat, in the absence of any provision of law for the issuing of patent, became the evidence of title in the owner of the land so located.

"On a subsequent application by Gov. Gilpin for a patent it was contended before this office that mineral existed in some part of the location, and therefore the grantee could not hold the land under the act. The matter was fully considered and the following conclusion reached:

"'The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined at the time of such location when the title passed, and to be non-mineral.

"'The act did not intend that, if at any subsequent time in the remote future, mineral should be discovered the title should be unsettled, or that the title should be the subject of controversy through all time, as often as one might choose to allege its mineral character.

"'The surveyor general did not undertake and had no power to impose conditions not in the act.

"'The question as to the mineral or non-mineral character of the land has been passed upon by competent authority; the title
207 has passed from the Government and vested in private individuals, and this office has no authority to reopen the question; the land can no longer be regarded as a part of the public domain.'

"You will see by the foregoing that the land in question was determined in 1864 by the surveyor general, whose province and duty it was, to be non-mineral; the location was then perfected and the title passed. Whether prospectors will be allowed to hold any mineral discoveries thereon prior to or since 1880 must probably rest between them and the holders of the location No. 4.

"Respectfully, N. C. McFARLAND,
"Commissioner."

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *June* 8, 1889.

"Jno. Duncan & Co., Westcliffe, Colo.

"GENTLEMEN: I am in receipt, by reference, of your letter dated the 18th ult., addressed to the Hon. Secretary of the Interior, in regard to mines and minerals within the surveyed limits of 'Baca Claim No. 4,' commonly known as the 'Gilpin grant.'

"In reply I have to say that by the 6th section of the act of Congress approved June 21, 1860, the Baca heirs were permitted to

select a quantity of land equal to that claimed by the town of Las Vegas to be located on vacant non-mineral land in New Mexico, in square bodies, not to exceed five in number, the same, when selected by the heirs, to be located and surveyed by the surveyor general of New Mexico.

"It was subsequently determined that each of said tracts should contain 99,289.39 acres, the one-fifth part of the area claimed by the town of Las Vegas.

"In the year 1863 said heirs selected the tract in question, three other tracts having been previously selected.

"At the time of its selection this tract was in Colorado, but at the date of the act (June 21, 1860) the tract was in the Territory of New Mexico.

"Thereafter Mr. Gilpin, who claimed the land as the assignee of the Baca heirs, applied for a patent, which was denied him for the reason that there was no provision of law for the issuance of patents on these locations.

"Mr. Gilpin was, however, given an approved plat of the official survey of this tract number 4, as evidence of title, in connection with the acts of Congress aforesaid and his purchase from the heirs.

"In determining the various questions involved in the case this office on March 21, 1879, decided that the character of the land involved had already been determined and the matter, therefore, was *res adjudicata*.

"'The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private indi-
208 viduals. This office has no authority to reopen the question. The land can no longer be regarded as a part of the public domain,' &c.

"The case has, therefore, become final so far as this office is concerned, and unless authorized to do so by some superior authority I cannot recognize entries or filings as established by the approved survey thereof.

"Very respectfully,

W. M. STONE,
"*Acting Commissioner.*"

5. The plaintiff has through various mesne conveyances succeeded to the rights of the heirs of Luis Maria Baca to the lands covered by Baca Grant No. 4, which include those in controversy in this suit.

6. Upon this state of facts, at the close of the evidence for the plaintiff, the circuit court instructed the jury as follows, and the plaintiff in error excepted to the various portions of the *of the* charge as noted below and has in this court duly assigned those parts of the charge duly excepted to as error, and has also duly assigned the court's instruction to the jury to return a verdict against him as error:

"HALLETT, *J.* (orally):

"This action, gentlemen of the jury, is to recover a small plat of land in what is known as the Baca Grant No. 4, in the San Luis

valley. I think it is — the county of Saguache, but I am not sure whether the county is given in the complaint.

"The plaintiff relies upon an act of Congress passed June 21st, 1860, by which the heirs of Luis Baca were permitted to locate this tract of land. You have heard the testimony at great length as to the way in which the location was made and surveyed and all the proceedings in the land office in respect to it. Objection is made that the location was not within the time limited by the act of Congress, which was three years, and that is put upon the ground that there was no sufficient description of the tract located to make it known to the public at large where the location would be, and upon the ground that the initial point from which the survey of the tract would be extended was not a fixed and determined point. That was declared in the paper filed with the surveyor general of New Mexico to be the point where the 38th parallel of latitude crosses the base of the snowy range which divides the waters of the Arkansas and Del Norte rivers at the eastern edge of the San Luis valley. It is said that this is not sufficient to fix the location, and there should have been some monument or some natural object open to the view of all people from which the lines should be run. Upon that I do not care to enter at length. I shall assume that the testimony which has been delivered before you is sufficient to enable you to determine this point, and that you would determine it under the testimony to have been properly fixed. If the location was so designated as to be understood by the public at large, I am of the opinion that the circumstance that no survey of the location was made within the three years following the passage of the act is not material. A sur-
209 vey was in fact made in the latter part of the year 1863 and about six months after the expiration of the three years mentioned in the act. I assume also that the survey made by Mr. Sheldon was sufficient in form. The lines were not closed at the northeast corner. There were three or four miles of the north line and perhaps a greater length of the east line which were not laid at that time because of the difficulty of traversing the mountains. The surveyor states in his notes that he found it impossible at the season of the year in which he was carrying on the work to proceed over the mountains, and so the lines were not laid at the time. This survey having been accepted by the officers of the Land Department and approved by them, it cannot be alleged that it was not in form sufficient or that there was any defect in it from the circumstance that a portion of the lines were omitted from the survey at the time when it was made.

"Upon that we come to another question, which is the most important in the whole case, and that is whether mineral lands passed by the terms of the act and what was done under it to the grantees therein. The act itself declares that the location of the tract shall be upon lands vacant and not mineral. The grantees, the heirs of Baca, were not at liberty to select mineral land. The complaint describes the land of which the defendant is said to be in possession that point; so that the question presented and simply stated is and which he wrongfully witholds from the plaintiff as mineral

land, so that you have no question to consider whether the lands were or were not of that character. The plaintiff having averred that they have the character of mineral lands, there is no issue upon whether mineral lands passed under the grant of the act of June 21st, 1860, and, as I have said, the grantees under that act, the heirs of Baca, were required to select lands which were not mineral. In any selection which they could make they could not determine the quality of the lands in that respect—that is to say, they could not determine in a manner which would be conclusive upon the Government and upon subsequent claimants under the Government whether the lands were or were not mineral. In order to make a valid determination of that matter there must be some participation by the Government in the selection—that is to say, the Government must investigate and pass upon the question whether the lands selected were or were not mineral.

"And so we come to the question whether anything was done by the Government in that direction at any time whatsoever or up to the time of the approval of the survey of the lands. It is contended for the plaintiff that the act itself and the selection of the lands under it make a good title in the grantees named in the act, and it may be true that no other evidence of title was required. I have not looked into that question particularly whether there was authority in the Government to issue a patent for the land or not. It is said, and it seems to be established by the various communications from the Land Department and the officers of that department, that they constantly maintain that there was no authority in the Government to issue a patent for the land, and therefore they
210 have declined to issue it. Upon all such occasions the officers of that department declared that the act of Congress and the survey with the plat of the land constituted the title of the grantees under the act. No further communication, and no other document or paper could be issued by the Government in confirmation of the title of the grantees. However that may be, if it appeared that the officers of the Land Department in Washington had at any time passed upon the question of the conclusiveness of the grant and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government and binding upon all who might subsequently make claim to it.

"It seems upon examination of the testimony which has been offered to you that no such determination was made. The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral. The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado of date February 12th, 1864, is that he will be authorized to approve the plat, upon finding it to be correct, in the usual way, and the Commissioner adds: 'In your certificate of approval you will add the special reservation stipulated by the

statute, but not to embrace mineral land nor to interfere with any other vested rights, if such exist'—that is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land, the Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.

"Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made he said that it was subject to the provisions of the act of June 21st, 1860, and, taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval. So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner, and if this be the correct construction of the papers and documents and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be, would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.

"There are several communications from the department to persons who were more or less interested in the tract, or who assume to have some interest in it, in which the Commissioner or some one connected with the department assume to say that the
211 matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever. We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or to give it any other effect than that which it appears to have from the letter of February 12th, 1864.

"Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in this case, that the act of June 21st, 1860, and what was done under that act from time to time did not vest in the grantees of Luis Maria Baca and their successors in interest, the mineral lands which may be within the tract located. This, of course, has no effect whatever upon such part of the tract, which seems to be by far the greater part, as is not mineral. That which is pastoral and agricultural only cannot be correctly described as mineral land, and it would doubtless pass under the grant without any question whatever such as is presented to us here.

"The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims is a mine is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a verdict upon the testimony for the defendant in the suit.

"And thereupon the plaintiff by his counsel objected and excepted to certain portions of the instructions so given by the court as hereinafter specifically set forth.

"'The court instructed the jury, among other things, as follows:

"'I think that if it appeared that the officers of the Land Depart-

ment in Washington had at any time passed upon the question of the conclusiveness of the grant and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and whatever its character, that the question was properly decided by the Government and binding upon all who might subsequently make claim to it. It seems upon examination of the testimony which has been offered to you that no such determination was made.'

"(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral.'

"(To which instruction of the court the plaintiff at the time objected and excepted.)

"'The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado of date February 12th, 1864, is that he will be authorized to approve the plat, upon finding it to be correct, in the usual way. And the Commissioner adds: "In your certificate of approval you will add the special reservation stipulated by the statute, but not to em-
212 brace mineral land, nor to interfere with any other vested rights, if such exist." That is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land.'

"(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'The Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.'

"(To which last instruction so given the plaintiff at the time objected and excepted.)

"'Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made he said that it was subject to the provisions of the act of June 21st, 1860; and taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval.'

"(To which last statement of the court as given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner.'

"(To which statement of the court as given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'And if this be the correct construction of the papers and documents and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the

approval might be would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.'

"(To which last statement of the court in his instructions to the jury the plaintiff at the time objected and excepted.)

"'There are several communications from the department to persons who were more or less interested in the tract or who assumed to have some interest in it, in which the Commissioner or some one connected with the department assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever.'

"(To which statement of the court so contained in his instructions to the jury the plaintiff at the time objected and excepted.)

"'We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or
213 to give it any other effect than that which it appears to have from the letter of February 12th, 1864.'

"(To which instruction of the court the plaintiff at the time objected and excepted.)

"'Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in the case, that the act of June 21st, 1860, and what was done under that act from time to time did not vest in the grantees of Luis Maria Baca and their successors in interest the mineral lands which may be within the tract located.'

"(To which instruction of the court so given to the jury the plaintiff at the time objected and *accepted*.)

"'This, of course, has no effect whatever upon such part of the tract, which seems to be far the greater part, as is not mineral, that which is pastoral and agricultural only and cannot be correctly described as mineral land, and it would doubtless pass under the grant without any question whatever such as is presented here.'

"'The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims as a mine is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a verdict upon the testimony for the defendant in the suit.'

"(To which last instruction and each part thereof so given to the jury the plaintiff at the time objected and excepted.)

"And thereupon, under the instruction of the court as aforesaid, the jury returned the verdict in favor of the defendant heretofore set out in the record.

"To which verdict and the returning of the same the plaintiff at the time objected and excepted."

7. The jury returned a verdict for the defendant pursuant to the instruction of the court, and judgment was accordingly entered against the plaintiff. A writ of error was duly sued out of this court to reverse that judgment, and the case is now pending in this court for hearing upon the assignments of error aforesaid.

And the said United States circuit court of appeals for the eighth

circuit further certifies that, to the end that it may properly decide the questions which arise in said case and which are presented by the assignments of error aforesaid, the said court desires the instruction of the Supreme Court of the United States upon the following questions and propositions of law:

First. Was the action of the Commissioner of the General Land Office or of the surveyor general of Colorado in 1863 and 1864, evidenced by the foregoing certificates and communications, a decision by the proper officer that none of the lands in said Baca Grant No. 4 were mineral lands, and a valid location upon the ground covered by said grant of the selection of that tract by the heirs of said Baca, under section six of the "act to confirm certain private
214 land claims in the Territory of New Mexico," approved June 21, 1860 (12 Stat., 72), or was the action of these officers a refusal to decide that question, and either an attempted or actual location of the selection of said heirs on that part only of the land described as Baca Grant No. 4 which should not at any time in the then future be found to be mineral land?

Second. Was the title to that portion of the lands described as Baca Grant No. 4, which is in controversy in this case and which was mineral land, but which was not known to be mineral land until 1876, vested in the heirs of Baca and their successors in interest by the said act of Congress and the action of the Commissioners of the General Land Office and of the surveyors general, evidenced by the foregoing certificates and communications?

Third. Was the direction of the circuit court to the jury to return a verdict for the defendant in this case right?

In witness whereof the undersigned, judges holding the said United States circuit court of appeals for the said eighth circuit, have hereunto set their hands this 30th day of March, A. D. 1896, at St. Louis, Missouri, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals, and by the clerk of said court be duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, No. 664, December term, A. D. 1895, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me forwarded to the said Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribed my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, this thirtieth day of March, A. D. 1896.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. 1895, December term. No. 664. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Certificate of questions to the Supreme Court of the United States. Filed Mar. 30, 1896. John D. Jordan, clerk.

Endorsed on cover: Case No. 16,252. U. S. circuit court of appeals, eighth circuit. Term No., 962. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Filed April 11, 1896.

215 (*Motion to Withdraw Original Exhibits.*)

And on the fifteenth day of December, A. D. 1896, a motion for leave to withdraw original exhibits was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error.

Motion to withdraw original exhibits.

The plaintiff in error, by Joel F. Vaile, as counsel, respectfully represents to the court that this court has heretofore of its motion certified the above-entitled cause to the Supreme Court of the United States upon certain questions by this court stated, which questions do not involve any consideration of the original exhibits filed with the record in this court; that the plaintiff has occasion to use said original exhibits in other litigation pending in the district of Colorado, and hereby respectfully moves the court that he have leave to withdraw said original exhibits, same being contained within a tin box heretofore deposited in the clerk's office of this court in connection with said cause.

JOEL V. VAILE,
Counsel for Plaintiff in Error.

Endorsed: 664. U. S. circuit court of appeals, 8th circuit. Quincy A. Shaw, pl'ff in error, *vs.* M. M. Kellogg, def't in error. Mo. to withdraw original exhibits. Filed Dec. 15, 1896. John D. Jordan, clerk. J. F. Vaile, for pl'ff in error.

(*Order: Leave to Withdraw Original Exhibits.*)

And on the fifteenth day of December, A. D. 1896, in the record of the proceedings of said circuit court of appeals is an order granting leave to withdraw original exhibits in the words and figures following:

216 United States Circuit Court of Appeals, Eighth Circuit, December Term, 1896.

TUESDAY, *December* 15, 1896.

QUINCY A. SHAW, Plaintiff in Error,
vs.
MURRAY M. KELLOGG, Defendant in Error. } No. 664.

In error to the circuit court of the United States for the district of Colorado.

On motion of Mr. Joel F. Vaile, counsel for the plaintiff in error, leave is granted said counsel to withdraw the original exhibits in this cause upon leaving with the clerk a receipt therefor conditioned that he will return same when so ordered by the court.

(*Receipt for Original Exhibits.*)

And on the fifteenth day of December, A. D. 1896, a receipt for said original exhibits was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

UNITED STATES OF AMERICA, }
Eighth Circuit. }

In the Court of Appeals.

QUINCY A. SHAW, Pl'ff in Error,
vs.
MURRAY M. KELLOGG, Def't in Error. } No. 664.

Received of John D. Jordan, clerk U. S. circuit court of appeals, all the original exhibits transmitted to this court with the transcript of the record on order of the circuit court of the district of Colorado, and we hereby stipulate that said original exhibits shall be promptly returned to the clerk of the court of appeals at any time upon order of the court or requirement of the said clerk to that effect

JOEL F. VAILE,
WOLCOTT & VAILE,
Att'ys for Pl'ff in Error.

12, 15, '96.

Endorsed: 664. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Receipt for original exhibits. Filed Dec. 15, 1896. John D. Jordan, clerk.

217 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing pages, numbered from 1 to —, inclusive, contain full, true, and complete copies of all the pleadings, proceedings, and record entries in a certain cause in said court, wherein Quincy A. Shaw was plaintiff in error and Murray M. Kellogg defendant in error, No. 664, as full, true, and complete as the originals of the same now remain on file and of record in my office.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, in the eighth circuit, this fifth day of January, A. D. 1898.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

218 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Quincy A. Shaw is plaintiff in error and Murray M. Kellogg is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Colorado, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,
219 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Return to Writ.

United States Circuit Court of Appeals, Eighth Circuit.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this fifth day of January, A. D. 1898.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

219½ [Endorsed:] Case No. 16,252. Supreme Court of the United States. No. 154. October term, 1897. Quincy A. Shaw *vs.* Murray M. Kellogg. Writ of certiorari and return. Filed Dec. 30, 1897. John D. Jordan, clerk. Filed Jan. 8, 1898.

Endorsed on cover: Case No. 16,252. Sup. Court U. S., October term, 1897. Term No., 154. Quincy A. Shaw *vs.* Murray M. Kellogg. Writ of certiorari and return. Filed January 8, 1898.

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 962. 457 154.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED APRIL 11, 1896.

(16,252.)

(16,252.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 962.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1895.

QUINCY A. SHAW, Plaintiff in Error, *vs.* MURRAY M. KELLOGG, Defendant in Error.	No. 664. In Error to the Circuit Court of the United States for the District of Colorado.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this 30th day of March, A. D. 1896, hereby certifies that upon the record on file in said court in the case wherein Quincy A. Shaw is plaintiff in error and Murray M. Kellogg is defendant in error, and which cause is now pending before this court upon a writ of error duly sued out to review the judgment in favor of the defendant in error which was rendered by the United States circuit court for the district of Colorado, the following facts are made to appear:

1. Quincy A. Shaw, the plaintiff in error, brought an action of ejectment in the circuit court for the district of Colorado against Murray M. Kellogg for the possession and title to the following specifically described premises, situated within the outer boundaries of Baca grant No. 4, to wit: Section twenty-two (22), township one (1) north, — one (1) east, according to the plat of said Baca grant No. 4 as filed and recorded in the office of the county clerk and recorder of said Saguache county, in the State of Colorado, including in said section twenty-two certain mineral-bearing property designated by the defendant as the Eastern Star mine, and other mining
2 lands adjacent thereto within said section twenty-two.

2. The plaintiff alleged in his complaint that the amount in controversy was more than two thousand dollars; that he was the owner of Baca grant No. 4 and entitled to the possession of all thereof, including the said section twenty-two; that the defendant had entered upon and ousted him from the possession thereof and still unlawfully withheld the same; that the matter in dispute in this action arises under an act of Congress entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860; that the plaintiff claims that by virtue of said act and the finding of the surveyor general as to the non-mineral character of said land the title to the premises in dispute vested in the heirs of Luis Maria Baca and through them in the plaintiff, although subsequent discoveries of precious metals were made upon the lands here in controversy; while the defendant, on the other hand, claims that under the proper construction of said act of Congress and the finding of the surveyor general the subsequent discovery of precious metals upon the premises in controversy excluded the same from the grant made under said act.

3. The defendant answered. In his answer he denied that the plaintiff was the owner of the section twenty-two described in the complaint or of the mine situated thereon or any of the adjacent

mining property thereon, or that he was entitled to the possession thereof. He denied that the location of the lands in controversy under said act of Congress was ever approved by the proper officers of the Land Department of the United States, or that the surveyor general of Colorado was authorized to or did certify that the lands in dispute were non-mineral, and he alleged that at the time of their location they were known to be mineral lands.

He averred that on April 24, 1876, the land in dispute, where the Eastern Star mine is now located, was unappropriated public mineral land of the United States, and as such was subject to
3 exploration and location; that thereupon the grantors of the defendant discovered a vein of quartz bearing gold and silver thereon, and thereupon took possession thereof and duly located their mining claim thereon; that they and their successors in interest have performed annually from that time until said answer was filed the requisite labor and made the necessary improvements to entitle them to the possession and ownership of said mining claim and the premises in dispute under and pursuant to the mining laws of the United States.

The plaintiff filed a replication to this answer.

4. The case proceeded to trial before the court and a jury and the plaintiff introduced evidence in support of the allegations of his complaint and rested his case. When he closed his evidence the following facts stood admitted by the pleadings or had been proved by the evidence which he had introduced:

A. The land in controversy in this suit was worth more than two thousand dollars and was mineral land, but there was no proof that it was known to be such prior to A. D. 1876, and it was within the limits of Baca grant No. 4.

B. The act of Congress entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860 (12 Stat., 72), contained the following section:

"SEC. 6. And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, That the right hereby
4 granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer."

C. Under this section the action indicated by the following communications and certificates was taken by the Commissioner of the General Land Office and the surveyors general of New Mexico and Colorado respectively:

"SURVEYOR GENERAL'S OFFICE, SANTA FÉ,
"NEW MEXICO, *December 8th*, 1860.

"Hon. Thomas Cabeza de Baca, legal representative of the heirs of Don Luis Maria Baca, dec'd.

"SIR: I hereby certify that the grant to the town of Las Vegas has been surveyed under instructions from this office and according to the laws of the United States, and that the acres of said tract of land *is* 496,446.96 acres.

"Under the act of Congress approved June 21st, 1860 (see Statutes at Large, page 71), the heirs of Luis Maria Baca are entitled to select, in not more than five square bodies, the amount of land equal to said area, upon any of the unoccupied lands, not mineral, of New Mexico, and the surveyor general is authorized to survey and locate the same. Therefore I notify you that this office is ready to co-operate with you and receive your application for the location of the lands granted by the Government.

"A. P. WILBAR,
"*Surveyor General of New Mexico.*"

"SURVEYOR GENERAL'S OFFICE, SANTA FÉ,
"NEW MEXICO, *December 8th*, 1860.

"SIR: Enclosed please find duplicate of the certificate in regard to the Las Vegas grant issued from this office to the legal representatives of the heirs of Luis Maria Baca.

"Yours very respectfully, A. P. WOLBAR,
"*Surveyor General.*

"Hon. Jos. S. Wilson, Com'r Gen'l Land Office."

"SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, *February 9th*, 1863.

"SIR: Please find enclosed herewith the application of the heirs of Luis Maria Baca to locate one-fifth of the private claim confirmed to them under the act of Congress approved June 21, 1860. The location falls within the Territory of Colorado, but within the limits of New Mexico as they existed at the date of the approval of the act confirming this claim.

"I have transmitted a copy of the enclosed to the surveyor general of Colorado to enable him when required to make the survey.

"I am, very respectfully, your ob't serv't,
"JOHN A. CLARK,
"*Surveyor General of New Mexico.*

"Hon. J. M. Edmunds, Com'r of General Land Office, Washington city, D. C."

"SURVEYOR GENERAL'S OFFICE,
"SANTA FÉ, NEW MEXICO, *February 5th*, 1863.

"I, John A. Clark, surveyor general of New Mexico, do hereby certify that on this day John S. Watts, Esq., in behalf of the heirs of Luis Maria Cabeza de Baca, filed in this office an application in the words and figures following, viz:

6 "'SANTA FÉ, NEW MEXICO, *December 12th*, 1862.

To Surveyor General John A. Clark, surveyor general of New Mexico:

I, John S. Watts, attorney of the heirs of Luis Maria Baca, have this day selected as one of the five locations belonging to the said heirs, under the 6th section of the act of Congress approved June 21st, 1860, a tract of land in the Territory of New Mexico described as follows:

Beginning at a point on the eastern edge of the valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the snowy range dividing the waters of the Rivers Arkansas and Del Norte, thence east along said parallel four and one-half miles, thence south along a meridian line twelve miles thirty-six chains and forty-four links' distance, thence west at a right angle twelve miles thirty-six chains and forty-four links' distance, thence north to the said specified parallel of latitude, thence east with said parallel to the place of beginning.

I further state that the said land is entirely vacant, not claimed by any one, is not mineral, but located for purposes of arable and pastoral agriculture, and is within the limits of the Territory of New Mexico as established in the organic act. I hereby accordingly make application for the survey and location of the tract of land in accordance with the provisions of the above act of Congress.

JOHN S. WATTS,
Attorney for Heirs of Luis Maria Baca.'

"And I further certify that the said tract of land, being the one-fifth part of the private claim confirmed to said heirs, contains ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, and that this location is the fourth
7 of the series, and with the three locations heretofore made, numbered one, two, & three, includes four-fifths of the said private claim confirmed to the heirs of Luis Maria Cabeza de Baca by the act of Congress approved June 21, 1860.

"In witness whereof I have hereunto set my name this fifth day of February, A. D. 1863.

"JOHN A. CLARK,
"*Surveyor General of New Mexico.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, Co. T'y, *Feb'y 24th*, 1863.

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C.

"SIR: I have the honor to report that I have this day received from the surveyor general of New Mexico a copy of the application of the att'y of the heirs of Luis Maria Baca for the location of one of the five locations belonging to said heirs under the act of June 21st, 1860, dated December 12th, 1862. The description of the tract selected is as follows: 'Beginning at a point (?) on the eastern edge of the valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the snowy range dividing the waters of

* * * the River-Arkansas and Del Norte, thence east along said parallel four and one-half miles, thence south along a meridian line twelve miles thirty-six chains and forty-four links' distance, thence west at a right angle twelve miles thirty-six chains and forty-four links' distance, thence north to the said specified parallel of latitude, thence east with said parallel to the place of beginning.'

"I suppose this selection has been made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca 'floats' and should locate it as this is located for the reason that, in his opinion, it would cover rich minerals in the mountains.

8 "Very truly, yours ob't serv't,

"FRANCIS M. CASE,
"*Surv. Gen'l Colo. & Utah.*"

"GENERAL LAND OFFICE, *March 13th*, 1863.

"Surveyor general Colorado and Utah, Denver city, Colorado T'y.

"SIR: I am in receipt of your communication, dated the 24th of February last, reporting that you have received from the surveyor general of New Mexico a copy of the application of the attorney of the heirs of Luis Maria Baca for the location of one-fifth of the private claim confirmed to said heirs, the location being within the limits of New Mexico as they existed at the date of the confirmation, but falling within what is now the Territory of Colorado.

"It is necessary before the application can be approved by this office that it be accompanied by the certificates of the surveyor general and the register & receiver that the land selected is vacant and not mineral. This is in accordance with our instructions to the surveyor general of New Mexico, extracts from which were furnished your office in our communication of June 7th, 1862, especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do, you will transmit to this office your official certificate setting forth these facts.

"You will also correspond with the register and receiver of Colorado when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same condi-

9 tions that your own is to be furnished under, which, when received, you will forward to this office.

"Very respectfully, your ob't serv't,

"JOS. S. WILSON,
"*Acting Commissioner.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Oct. 13th*, 1863.

"SIR: On the 3d day of October of the present year William Gilpin, as representative of the heirs of Luis Maria Baca, filed in

this office an application for the survey of grant No. 4 of the grants confirmed by the said heirs by act of Congress of June 21st, 1860, a copy of which application is herewith submitted.

"Mr. Gilpin further represented that he was desirous of taking immediate possession and improving the said grant, and that to do so it would be necessary to have the survey made during the next six weeks to avoid the deep snow which would render the survey impossible.

"I informed him that the instructions in this office forbid making the survey of any grant situated more than six miles from existing lines of public surveys, but as his grant was in a part of the country which it would probably be some time before the lines of survey would reach I would order the survey and make a contract subject to your approval. A copy of my reply to his application is herewith submitted.

"As there is yet no United States depository in operation in this country, Mr. Gilpin deposited the money with me and took my receipt for the same, a copy of which receipt is herewith enclosed. The money is in my hands subject to your order as to the disposition of it, but in case of the non-approval of the contract the money was to remain in my hands until the survey was finished and to be paid to the deputy for the work done, the survey being considered private and not official. This was done in order to secure myself and the deputy, as Mr. Gilpin wished the deputy to take the field immediately.

"I transmit herewith the copy of a contract made with Deputy Surveyor A. Z. Sheldon for the survey of the above-mentioned grant, and also my instructions to said deputy. I have acted in this matter as in my judgment seemed best under the circumstances, and hope it will meet your approval.

"Very respectfully, your ob't serv't,

"JOHN PIERCE,

"*Surveyor General of Colorado and Utah.*

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C."

"GENERAL LAND OFFICE, *November 2nd*, 1863.

"John Pierce, Esq., surveyor general, Denver, Col. Ter.

"SIR: In reply to your communication of the 12th ultimo covering contract—instructions and contract—with Deputy Surveyor A. Z. Sheldon for the survey of grant No. 4 of the Baca heirs, I have to say this office cannot approve said contract. In your letter dated the 10th March last, transmitting the application of the attorney of said heirs for the location of this claim, you say, 'I suppose this selection is being made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca floats and should locate it as this is located, for the reason that in his opinion it would cover rich minerals in the mountains.'

"Upon receipt of your letter you were expressly informed, under date of the 13th March, 1860, that before the application could be

approved it must be accompanied by the certificates of the
11 surveyor general and the register and receiver that the land is vacant and not mineral, and I then took occasion to communicate the following explicit instructions: 'Especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Gov. Gilpin, which you communicate in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in the selection are vacant and not mineral, to enable you to do so, you will transmit to this office your official certificate setting forth these facts.'

"In our communication of the 7th June, 1862, you were also furnished with extracts from our instructions to the surveyor general of New Mexico, referring to the location of these claims, in which it was plainly indicated that should selections be made outside of the existing surveys, the survey thereof must be postponed until the vicinity is reached by the regular progress of the public surveys. You will be guided in your official acts by our instructions, which are full and explicit, in relation to the location of the claims referred to. The contract and instructions for the survey of the above-mentioned claim are herewith returned.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Dec. 12th*, 1863.

"SIR: I have the honor to acknowledge the receipt of your letter of the 2nd of Nov. last, disapproving of the contract for the survey of grant No. 4 of the floats belonging to the heirs of Luis Maria Baca.

"I herewith transmit my certificate that the lands are 'not mineral and are vacant.' You refer to a letter of the former
12 surv. gen'l of this district, in which he says that he supposes that this location was made by Mr. Gilpin, 'for the reason that, in his opinion, it would cover rich mineral lands.' I do not believe that at the time Mr. Case wrote that letter he had the least idea that the float as located covered any mineral lands. I have signed the accompanying certificate partly from my own knowledge of the country, but mostly from the following reasons:

"1st. The discoveries of gold thus far go to show that the gold lands of Colorado commence at the base of Long's peak and extend in a course about 30° west of south to the head-waters of the San Juan, covering a belt of country about 30 miles in width, of which the line indicated will be near the western boundary; outside of this no gold or silver lodes have been discovered.

"2nd. The grant is located on the great line of travel between Denver and Santa Fé, and thousands of experienced miners have been travelling *of* the Sangre de Christo and Mosca passes and have found no gold or other valuable minerals.

"3rd. In the summer of 1860 a party of one hundred and fifty

miners from here, under one Roeder, went to the San Luis valley and prospected the whole of the Sangre de Christo range, but found no gold anywhere on the eastern run of the park. Many of the men who were in this expedition have been in my employ, and from them I have had this history of the expedition.

"Such are the grounds on which I have signed the certificate, and to me they are satisfactory.

"The survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessable at any time of the year.

"I have refunded to Mr. Gilpin the money placed in my hands, and he has paid for the survey as a private survey, though he has permitted me to make an abstract of the field-notes, which I have placed on file in this office.

13 "Your letter of November 16th, granting me a leave of absence, is also received. The cold weather has so protracted the surveys that I cannot avail myself of it, though it is possible that I may wish to visit the States some time during the winter or spring.

"Very truly, your ob't serv't, JOHN PIERCE,
"*Surv. Gen'l of Colorado & Utah.*

"Hon. J. M. Edmunds, Com'r Gen'l Land Office, Washington, D. C."

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *Dec. 5th*, 1863.

"SIR: This is to certify that from good and sufficient evidence I am perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

"Very truly, your ob't serv't, JOHN PIERCE,
"*Surveyor General of Colorado and Utah.*"

"GENERAL LAND OFFICE, *January 16th*, 1864.

"John Pierce, Esq., surveyor general, Denver city, C. T.

"SIR: Your letter of the 14th Dec. last, with inclosed certificate relating to the 4th location of the Baca heirs, is received.

"The act of 21st of June, 1860, confirming the claim of Luis Maria Baca, authorized the heirs of said Baca to select in lieu
14 of the tract claimed by the town of Las Vegas an equal quantity of vacant land not mineral. With a view to carry out the requirements of the law, the surveyor general of Colorado was required in our instructions of June 7th, 1862, to accompany the final rendition of the certificate with his own statement, and also that of the register and receiver, setting forth the fact that the land selected is vacant and not mineral. Those instructions were reiterated in our letter of March 13th, 1863.

"The evidence furnished by you is not sufficient, in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral deposits. Your certificate is not based upon actual

knowledge of the facts, but upon the information and conclusions deduced from reasoning. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of ex-Governor Gilpin, officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.

"The statement of the register and receiver, required in our instructions, is also wanting.

"The approval of the selection will stand suspended until some satisfactory proof is obtained upon the points indicated.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

"GENERAL LAND OFFICE, *February* 12, 1864.

"John Pierce, Esq., surveyor general, Denver city, Colo.

"SIR: I have considered your report of the 14th December
15 last respecting the survey made in November, 1863, by Deputy Surveyor Albinus Z. Sheldon, of what is known as the Luis Maria Baca float, in San Luis park, in Colorado, and containing 92,293 acres.

"You transmit your certificate 'that the lands are not mineral and are vacant,' and state under specific heads 'the grounds on which' you 'have signed the certificate' and which are satisfactory to you. You report further that 'the survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessible at any time of the year.'

"The act of Congress approved 21st June, 1860, U. S. Statutes at Large, vol. 12, page 71, chap. 167, confers authority for the location of the said Baca float in the then Territory of New Mexico, but now a part of Colorado Territory.

"The said statute makes it the 'duty of the surveyor general of New Nexico,' now in your jurisdiction, 'to make survey and location of the lands so selected by the heirs of Baca when thereunto required by them,' with a proviso making a three years' limitation to the statute.

"You further report that you have refunded to Mr. Gilpin the money placed in your 'hands and he has paid for the survey as a private survey, though he has permitted' you 'to make an abstract of the field-notes which' you 'have placed on file in' the surveyor general's office.

"This part of the proceedings is irregular. Under statutory requirements it is obligatory upon private claimants to pay for the survey of confirmed private claims, but the work must be done under the usual obligations and responsibilities both of deputies & surveyor general.

"The difficulty, however, may be avoided by pursuing the following course: The original field-notes, duly verified and authen-

ticated, must be filed in the surveyor general's office of Colo-
16 rado upon bringing these to the usual satisfactory tests, and finding the same all regular and correct you are authorized in virtue of the aforesaid 6th section of the said act of 21st June, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights if such exist.

"The statute does not order the issue of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will therefore constitute the evidence of title.

"You will take care so to arrange the matter that hereafter when in the gradual progress of the lines of the public surveys they shall reach the Baca location they shall be properly connected therewith and so appear on the township plats.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

"GENERAL LAND OFFICE, *Feb'y 26th*, 1864.

"John Pearce, Esq., surveyor general, Denver city, Colorado T.

"SIR: At the request of Wm. Gilpin, Esq., I herewith transmit the following papers, to wit:

"First. Mr. Gilpin's application for the survey of grant No. 4 of the heirs of Baca, dated Oct. 3rd, 1863.

"Second. Surveyor general's estimate of the cost of said survey, dated October 5th, 1863.

"Third. Surveyor general's receipt for $600, deposited by
17 Mr. Gilpin to pay for the above survey, October 6th, 1863.

"Fourth. Certificate of the register and receiver at Golden City, Colorado, that the lands covered by the said grant No. 4 are not mineral and are vacant, December 5th, 1863.

"Fifth. The field-notes of the boundary lines of the above grant, together with plat thereof.

"These papers were deposited in this office by Mr. Gilpin and are transmitted to you for such action as you shall deem proper in the premises, in accordance with the views expressed in our communication to you dated the 12th instant.

"Very respectfully, your obedient servant,

"J. N. EDMUNDS,
"*Commissioner.*"

"COLORADO TERRITORY, GOLDEN CITY, *Dec. 5th*, 1863.

"SIR: This is to certify that from good and sufficient evidence we are perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their grant, No. 4, in the San Luis valley, and marked out a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

"G. N. CHILCOTT,
"*Register Land Office, Colo. Dist.*
"C. B. CLEMENTS,
"*Receiver Land Office, Colo. Ty.*"

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *March 29th*, 1864.

"SIR: I have the honor to acknowledge the receipt of your letter of Feb'y 26th, enclosing field-notes and papers in regard to the survey of grant No. 4 of the heirs of Luis Maria Baca.

"I herewith enclose transcript of field-notes & plat of said survey. I have furnished ex-Gov. Gilpin with one copy of the plat and retained one in the office.

18 "Very respectfully, your ob't serv't,

"JOHN PIERCE,
"*Surveyor General of Colorado & Utah.*"

The transcript of the field-notes referred to in the last letter contained the following and no other references to the mineral or non-mineral character of the lands contained in Baca grant No. 4, viz: "Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle set forth in the notes," and it was accompanied with the following certificate:

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., *March 15th*, 1864.

"The foregoing field-notes of the survey of grant No. 4, heirs of Luis Maria Baca, executed by Albinus Z. Sheldon, under his contract of the 7th day of October, 1863, having been critically examined, the necessary corrections and explanations made, the said field-notes and the survey they describe are hereby approved.

"JOHN PIERCE,
"*Surveyor General of Colorado and Utah.*"

The transcript of the survey referred to in the last letter had the following certificate indorsed thereon:

"The above map of the boundary lines of grant No. 4, of the heirs of Luis Maria Baca, in San Luis valley, Colorado Territory, as surveyed by Albinus Z. Sheldon, under his contract bearing date the 7th day of October, 1863, is strictly conformable to the field-notes on file in this office, which have been examined and approved, subject to the conditions and provisions of sec. 6 of the act of Congress approved June 21st, 1860.

"Surveyor general's office, Denver, March 18th, 1864.

"JOHN PIERCE,
"*Sur. Gen'l Colo. & Utah.*"

19 "GENERAL LAND OFFICE, *May 4th*, 1864.

"John Pierce, Esq., surveyor general, Denver city, C. T.

"SIR: Your letter of March 29th last, transmitting transcript & field-notes of the survey of grant No. 4, of the heirs of Luis Maria Baca, has been received at this office.

"Very respectfully, your ob't serv't,

"J. M. EDMUNDS,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *January* 14, 1868.

"Hon. J. S. Watts, present.

"SIR: Referring to your application of the 12th inst. for the issuing of patent for the tract of land in Colorado known as 'Baca tract No. 4.' I have to state that the selection authorized by the 6th section of the act of 21st June, 1860 (Stats., vol. 12, page 72), has been made, and the survey executed and reported to this office; but as no provision is made in the statute for the issuing of patent, the survey and statute are the only authorized evidences of title, this office having no authority to issue patents unless the statute expressly orders the same, which is not done in the Baca case; but 'that a grant may be made by a law as well as a patent pursuant to a law is undoubted (6 Cr., 128). A confirmation by a law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*.' (12 Peters' Reports of the Decisions of the Supreme Court of the United States, page 454.)

"Very respectfully, your ob't serv't,

"JOS. S. WILSON,
"*Commissioner*."

20 "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *Mch 21st*, 1879.

"Mr. Wm. L. Campbell, surveyor gen'l of Colorado.

"SIR: I have considered the application of Hon. Wm. Gilpin for a patent to the tract of land known as Baca claim No. 4, in Colorado.

"Section six of the act of Congress approved June 21, 1860, provided that the heirs of Luis Maria Baca might select a quantity of land equal to that claimed by the town of Las Vegas, to be located on vacant non-mineral land in New Mexico, in square bodies not to exceed five in number, the same when selected by the heirs to be surveyed and located by the surveyor general of New Mexico.

"It was subsequently ascertained that the quantity of land claimed by the town of Las Vegas, and therefore the amount to be selected by the Baca heirs, was 496,446.96 acres.

"In 1863 the Baca heirs selected the land now in question. This was the fourth tract, three having been previously selected, and therefore this tract was designated as Baca claim No. 4. It contains 99,289.39 acres, being one-fifth of the amount granted to said heirs.

"This was at the time of its selection in the Territory of Colorado; but at the date of the act making the grant, June 21, 1860, the tract was a part of the Territory of New Mexico.

"After the selection of this tract it was surveyed and located by the surveyor general of Colorado, he having first determined that the land was vacant and non-mineral.

"The seventeenth section of the act of Congress approved Feb. 28, 1861, gave the surveyor general of Colorado the same authority

concerning the location of this tract as was originally conferred on the surveyor general of New Mexico.

"After the selection, but previous to the location, the Com-
21 missioner of the General Land Office instructed the surveyor general of Colorado that as the statute did not authorize the issuing of a patent, the act of June 21, 1860, and the plat approved by the surveyor general would constitute the evidence of title.

"There is no doubt that Government may convey and vest the legal title without issuing a patent as effectually as may be done by a patent. Larriviere *v.* Madegan, 1 Dillon, 455; Gregnon *v.* Aster, 2 Howard, 319; 3 Opinions of Att'y Gen., 350.

"The surveyor general was authorized by the act to locate only vacant non-mineral land. Unless the contrary appeared, it would be presumed from the act of locating that the surveyor general determined the land was not mineral.

"It is now alleged that the land is mineral; that the surveyor general approved the plat of survey 'subject to the conditions and provisions of section six of the act of Congress approved June 21, 1860,' and that, therefore, the grantees cannot hold the land under that act.

"The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined at the time of such location, when the title passed, to be non-mineral land.

"The act did not intend that if, at any subsequent time in the remote future, mineral should be discovered the title should be unsettled or that the title should be the subject of controversy through all time, as often as any one might choose to allege its mineral character.

"The surveyor general did not undertake and had no power to impose conditions not in the act.

"If, after fifteen years, the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years? If the question may be reopened as to the land granted under the provisions of the act of June 21,
1860, why may it not as to land acquired under the home-
22 stead, pre-emption, and other acts of Congress? Would such titles ever be considered secure?

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority. The title has passed from the Government and vested in private individuals. This office has no authority to reopen the question. The land cannot longer be regarded as a part of the public domain.

"Mr. Gilpin, who claims this tract of land as the assignee of the Baca heirs, makes personal application for a patent. It is not claimed that the granting act authorized a patent to issue, but that it is authorized by section two of the act approved March 3, 1869 (15 Stat., 342), and by sec. 2447, Rev. Stat. U. S.; but those provisions authorize patent to issue only when claims to land have been confirmed by law—that is, where an act of Congress recognizes a claim to specific land—and does not apply to cases where the

acts of Congress only authorize a claim to be made thereafter to land without regard to any specific tract or parcel of land. This office can issue patents only where it is authorized by some act of Congress. The application of Mr. Gilpin for a patent must therefore be refused.

"Very respectfully, J. A. WILLIAMSON,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *June 28th*, 1884.

"W. Niel Dennison, Esq., Cañon City, Colorado.

"SIR: I have received, by reference from the department, your letter of June 12th inst., addressed to the Hon. Secretary of the Interior, relating to the Baca location No. 4 ("Gilpin grant"), in which you inquire, 1st, if said grant is located on mineral or non-mineral land, and, 2nd, if prospectors will be allowed to
23 hold any mineral discoveries made on said No. 4 prior to the year 1880.

"In reply to said inquiries I have to say that by the 6th section of the act of June 21, 1860 (12 Stat., 71), the heirs of Baca were authorized to select the quantity of land awarded to them, in not more than five square bodies, upon vacant non-mineral land, and it was made the duty of surveyor general to make survey and location of the land selected, of course subject to the conditions imposed as to the character of the land awarded.

"In the case of location No. 4, in question, the surveyor general, having first ascertained and determined that the land selected was vacant and non-mineral, surveyed and located it, and approved the plat of the location March 18, 1864, and this approved plat, in the absence of any provision of law for the issuing of patent, became the evidence of title in the owner of the land so located.

"On a subsequent application by Gov. Gilpin for a patent it was contended before this office that mineral existed in some part of the location, and therefore the grantee could not hold the land under the act. The matter was fully considered and the following conclusion reached:

"'The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined at the time of such location when the title passed and to be non-mineral.

"'The act did not intend that, if at any subsequent time in the remote future, mineral should be discovered the title should be unsettled, or that the title should be the subject of controversy through all time, as often as one might choose to allege its mineral character.

"'The surveyor general did not undertake and had no power to impose conditions not in the act.

"'The question as to the mineral or non-mineral character of the land has been passed upon by competent authority; the title has

passed from the Government and vested in private individ-
24 uals, and this office has no authority to reopen the question: the land can no longer be regarded as a part of the public domain.'

"You will see by the foregoing that the land in question was determined in 1864 by the surveyor general, whose province and duty it was, to be non-mineral; the location was then perfected and the title passed. Whether prospectors will be allowed to hold any mineral discoveries thereon prior to or since 1880 must probably rest between them and the holders of the location No. 4.

"Respectfully, N. C. McFARLAND,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *June* 8, 1889.

"Jno. Duncan & Co., Westcliffe, Colo.

"GENTLEMEN: I am in receipt, by reference, of your letter dated the 18th ult., addressed to the Hon. Secretary of the Interior, in regard to mines and minerals within the surveyed limits of 'Baca claim No. 4,' commonly known as the 'Gilpin grant.'

"In reply I have to say that by the 6th section of the act of Congress approved June 21, 1860, the Baca heirs were permitted to select a quantity of land equal to that claimed by the town of Las Vegas to be located on vacant non-mineral land in New Mexico, in square bodies, not to exceed five in number, the same, when selected by the heirs, to be located and surveyed by the surveyor general of New Mexico.

"It was subsequently determined that each of said tracts should contain 99,289.39 acres, the one-fifth part of the area claimed by the town of Las Vegas.

"In the year 1863 said heirs selected the tract in question, three other tracts having been previously selected.

25 "At the time of its selection this tract was in Colorado, but at the date of the act (June 21, 1860) the tract was in the Territory of New Mexico.

"Thereafter Mr. Gilpin, who claimed the land as the assignee of the Baca heirs, applied for a patent, which was denied him for the reason that there was no provision of law for the issuance of patents on these locations.

"Mr. Gilpin was, however, given an approved plat of the official survey of this tract number 4, as evidence of title, in connection with the acts of Congress aforesaid and his purchase from the heirs.

"In determining the various questions involved in the case this office on March 21, 1879, decided that the character of the land involved had already been determined and the matter, therefore, was *res adjudicata*.

"'The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals.

This office has no authority to reopen the question. The land can no longer be regarded as a part of the public domain,' &c.

"The case has, therefore, become final so far as this office is concerned, and unless authorized to do so by some superior authority I cannot recognize entries or filings as established by the approved survey thereof.

"Very respectfully,

W. M. STONE,
"*Acting Commissioner.*"

5. The plaintiff has through various mesne conveyances succeeded to the rigl ts of the heirs of Luis Maria Baca to the lands covered by Baca grant No. 4, which include those in controversy in this suit.

6. Upon this state of facts, at the close of the evidence for the plaintiff, the circuit court instructed the jury as follows, and the plaintiff in error excepted to the various portions of the *of*
26 *the* charge as noted below and has in this court duly assigned those parts of the charge duly excepted to as error, and has also duly assigned the court's instruction to the jury to return a verdict against him as error:

"HALLETT, *J.*, (orally):

"This action, gentlemen of the jury, is to recover a small plat of land in what is known as the Baca grant No. 4, in the San Luis valley. I think it is the county of Saguache, but I am not sure whether the county is given in the complaint.

"The plaintiff relies upon an act of Congress passed June 21st, 1860, by which the heirs of Luis Baca were permitted to locate this tract of land. You have heard the testimony at great length as to the way in which the location was made and surveyed and all the proceedings in the Land Office in respect to it. Objection is made that the location was not within the time limited by the act of Congress, which was three years, and that is put upon the ground that there was no sufficient description of the tract located to make it known to the public at large where the location would be, and upon the ground that the initial point from which the survey of the tract would be extended was not a fixed and determined point. That was declared in the paper filed with the surveyor general of New Mexico to be the point where the 38th parallel of latitude crosses the base of the snowy range which divides the waters of the Arkansas and Del Norte rivers at the eastern edge of the San Luis valley. It is said that this is not sufficient to fix the location, and there should have been some monument or some natural object open to the view of all people from which the lines should be run. Upon that I do not care to enter at length. I shall assume that the testimony which has been delivered before you is sufficient to enable you to determine this point, and that you would determine it under the testimony to have been properly fixed. If the location was so designated as to be understood by the public at large, I am of the opinion that the
27 circumstance that no survey of the location was made within the three years following the passage of the act is not material.

A survey was in fact made in the latter part of the year 1863 and about six months after the expiration of the three years mentioned in the act. I assume also that the survey made by Mr. Sheldon was sufficient in form. The lines were not closed at the northeast corner. There were three or four miles of the north line and perhaps a greater length of the east line which were not laid at that time because of the difficulty of traversing the mountains. The surveyor states in his notes that he found it impossible at the season of the year in which he was carrying on the work to proceed over the mountains, and so the lines were not laid at the time. This survey having been accepted by the officers of the Land Department and approved by them, it cannot be alleged that it was not in form sufficient or that there was any defect in it from the circumstance that a portion of the lines were omitted from the survey at the time when it was made.

"Upon that we come to another question, which is the most important in the whole case, and that is whether mineral lands passed by the terms of the act and what was done under it to the grantees therein. The act itself declares that the location of the tract shall be upon lands vacant and not mineral. The grantees, the heirs of Baca, were not at liberty to select mineral land. The complaint describes the land of which the defendant is said to be in possession and which he wrongfully withholds from the plaintiff as mineral land, so that you have no question to consider whether the lands were or were not of that character. The plaintiff having averred that they have the character of mineral lands, there is no issue upon that point, so that the question presented and simply stated is whether mineral lands passed under the grant of the act of June 21st, 1860, and, as I have said, the grantees under that act,
28 the heirs of Baca, were required to select lands which were not mineral. In any selection which they could make they could not determine the quality of the lands in that respect—that is to say, they could not determine in a manner which would be conclusive upon the Government and upon subsequent claimants under the Government whether the lands were or were not mineral. In order to make a valid determination of that matter there must be some participation by the Government in the selection—that is to say, the Government must investigate and pass upon the question whether the lands selected were or were not mineral.

"And so we come to the question whether anything was done by the Government in that direction at any time whatsoever or up to the time of the approval of the survey of the lands. It is contended for the plaintiff that the act itself and the selection of the lands under it make a good title in the grantees named in the act, and it may be true that no other evidence of title was required. I have not looked into that question particularly whether there was authority in the Government to issue a patent for the land or not. It is said, and it seems to be established by the various communications from the Land Department and the officers of that department, that they constantly maintain that there was no authority in the Government to issue a patent for the land, and therefore they

have declined to issue it. Upon all such occasions the officers of that department declared that the act of Congress and the survey with the plat of the land constituted the title of the grantees under the act. No further communication and no other document or paper could be issued by the Government in confirmation of the title of the grantees. However that may be, if it appeared that the officers of the Land Department in Washington had at any time passed upon the question of the conclusiveness of the grant and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government and binding upon all who might subsequently make claim to it.

29 "It seems upon examination of the testimony which has been offered to you that no such determination was made. The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral. The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado of date February 12th, 1864, is that he will be authorized to approve the plat upon finding it to be correct in the usual way, and the Commissioner adds: 'In your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights, if such exist'—that is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land, the Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.

"Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made he said that it was subject to the provisions of the act of June 21st, 1860, and, taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval, so that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner, and if this be the correct construction of the papers and documents and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be would at all change the character of the transaction or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.

30 "There are several communications from the department to persons who were more or less interested in the tract, or who assume to have some interest in it, in which the Commissioner or some one connected with the department assume to say that the

matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever. We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or to give it any other effect than that which it appears to have from the letter of February 12th, 1864.

"Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in this case, that the act of June 21st, 1860, and what was done under that act from time to time did not vest in the grantees of Luis Maria Baca and their successors in interest the mineral lands which may be within the tract located. This, of course, has no effect whatever upon such part of the tract, which seems to be by far the greater part, as is not mineral. That which is pastoral and agricultural only cannot be correctly described as mineral land, and it would doubtless pass under the grant without any question whatever such as is presented to us here.

"The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims is a mine is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a verdict upon the testimony for the defendant in the suit.

"And thereupon the plaintiff, by his counsel, objected and excepted to certain portions of the instructions so given by the court as hereinafter specifically set forth.

"'The court instructed the jury, among other things, as follows:

"'I think that if it appeared that the officers of the Land Department in Washington had at any time passed upon the ques-
31 tion of the conclusiveness of the grant and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government and binding upon all who might subsequently make claim to it. It seems upon examination of the testimony which has been offered to you that no such determination was made.'

"(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'The communication upon which the surveyor general of the Territory of Colorado approved the plat and the notes of survey expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral.'

"(To which instruction of the court the plaintiff at the time objected and excepted.)

"'The instruction of the Commissioner of the General Land Office, as found in a letter to the surveyor general of Colorado of date February 12th, 1864, is that he will be authorized to approve the plat, upon finding it to be correct, in the usual way. And the Commissioner adds: "In your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace

mineral land, nor to interfere with any other vested rights, if such exist." That is to say, the surveyor general of Colorado was authorized to approve the plat in so far as it did not embrace mineral land.'

"(To which last statement of the court so given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'The Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.'

"(To which last instruction so given the plaintiff at the time objected and excepted.)

32 "'Now, it is true that the surveyor general did not put these words in his approval. In the approval which he in fact made he said that it was subject to the provisions of the act of June 21st, 1860, and, taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval.'

"(To which last statement of the court as given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner.'

"(To which statement of the court as given in his instructions to the jury the plaintiff at the time objected and excepted.)

"'And if this be the correct construction of the papers and documents and of the act of the surveyor general in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be would at all change the character of the transaction or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.'

"(To which last statement of the court in his instructions to the jury the plaintiff at the time objected and excepted.)

"'There are several communications from the department to persons who were more or less interested in the tract or who assumed to have some interest in it, in which the Commissioner or some one connected with the department assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey. I cannot give to these communications any effect whatever.'

"(To which statement of the court so contained in his instructions to the jury the plaintiff at the time objected and excepted.)

"'We must assume that the Commissioner had no author-
33 ity to thus construe the decision of his predecessor in office

or to give it any other effect than that which it appears to have from the letter of February 12th, 1864.'

"(To which instruction of the court the plaintiff at the time objected and excepted.)

"'Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in the case, that the act of June 21st, 1860, and what was done under that act from time to time did not vest in the grantees of Luis Maria Baca and their successors in interest the mineral lands which may be within the tract located.'

"(To which instruction of the court so given to the jury the plaintiff at the time objected and *accepted*.)

"'This, of course, has no effect whatever upon such part of the tract, which seems to be far the greater part, as is not mineral, that which is pastoral and agricultural only and cannot be correctly described as mineral land, and it would doubtless pass under the grant without any question whatever such as is presented here.

"'The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims as a mine is embraced in the grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a verdict upon the testimony for the defendant in the suit.'

"(To which last instruction and each part thereof so given to the jury the plaintiff at the time objected and excepted.)

"And thereupon, under the instruction of the court as aforesaid, the jury returned the verdict in favor of the defendant heretofore set out in the record.

"To which verdict and the returning of the same the plaintiff at the time objected and excepted."

7. The jury returned a verdict for the defendant pursuant to the instruction of the court, and judgment was accordingly en-
34 tered against the plaintiff. A writ of error was duly sued out of this court to reverse that judgment, and the case is now pending in this court for hearing upon the assignments of error aforesaid.

And the said United States circuit court of appeals for the eighth circuit further certifies that, to the end that it may properly decide the questions which arise in said case and which are presented by the assignments of error aforesaid, the said court desires the instruction of the Supreme Court of the United States upon the following questions and propositions of law:

First. Was the action of the Commissioner of the General Land Office or of the surveyor general of Colorado in 1863 and 1864, evidenced by the foregoing certificates and communications, a decision by the proper officer that none of the lands in said Baca grant No. 4 were mineral lands, and a valid location upon the ground covered by said grant of the selection of that tract by the heirs of said Baca, under section six of the "Act to confirm certain private land claims

in the Territory of New Mexico," approved June 21, 1860 (12 Stat., 72), or was the action of these officers a refusal to decide that question, and either an attempted or actual location of the selection of said heirs on that part only of the land described as Baca grant No. 4 which should not at any time in the then future be found to be mineral land?

Second. Was the title to that portion of the lands described as Baca grant No. 4, which is in controversy in this case and which was mineral land, but which was not known to be mineral land until 1876, vested in the heirs of Baca and their successors in interest by the said act of Congress and the action of the Commissioners of the General Land Office and of the surveyors general, evidenced by the foregoing certificates and communications?

Third. Was the direction of the circuit court to the jury to return a verdict for the defendant in this case right?

35 In witness whereof the undersigned, judges holding the said United States court of appeals for the said eighth circuit, have hereunto set their hands this 30th day of March, A. D. 1896, at St. Louis, Missouri, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals, and by the clerk of said court be duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

36 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg, No. 664, December term, A. D. 1895, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me forwarded to the said Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, this thirtieth day of March, A. D. 1896.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] U. S. circuit court of appeals, eighth circuit. 1895, December term. No. 664. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Certificate of questions to the Supreme Court of the United States. Filed Mar. 30, 1896. John D. Jordan, clerk.

Endorsed on cover: Case No. 16,252. U. S. circuit court of appeals, eighth circuit. Term No., 962. Quincy A. Shaw, plaintiff in error, *vs.* Murray M. Kellogg. Filed April 11, 1896.

No. 962. 489
Motion Papers for P. C.
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Filed April 27, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 962.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG.

APPLICATION OF PLAINTIFF IN ERROR FOR CERTIFICATION OF ENTIRE RECORD UNDER CLAUSE II OF RULE 37.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Attorneys for Plaintiff in Error.

(16,252.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 962.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG, DEFENDANT IN ERROR.

APPLICATION FOR CERTIFICATION OF ENTIRE RECORD UNDER CLAUSE II OF RULE 37.

The plaintiff in error respectfully represents unto the Court that this cause has been brought to this Court from the United States circuit court of appeals for the eighth circuit upon a statement and certain questions certified to this Court by the said circuit court of appeals, under the provisions of section VI of the act of March 3, 1891, for the instructions of this Court upon the questions so submitted.

And the plaintiff in error respectfully represents unto the Court that it is important in the consideration of said cause and the determination thereof that this Court should have before it the entire record therein; that the said cause was originally determined in the trial court by a direction for a verdict at the conclusion of the plaintiff's evidence; that

in order to fully and fairly present the merits of the controversy it is necessary for this Court to inspect certain evidence, documentary and otherwise, contained in the record of said cause, which is not fully set forth in the statement certified to this Court by the said court of appeals.

The plaintiff in error further represents unto the Court that the main question involved in said cause is as to whether the heirs of Luis Maria Baca, grantees of the United States under the act of Congress of June 21, 1860, entitled "An act to confirm certain private land claims in the Territory of New Mexico," upon the confirmation to them of Baca grant No. 4 obtained the title to such portion of said lands, not then known to be mineral, as were in subsequent years ascertained to contain mineral.

That the proper determination of said question involves a consideration of the acts of the General Land Office of the United States in the location, survey, approval of survey and location, and subsequent recognition of the title of the heirs of Luis Maria Baca to said lands.

The plaintiff in error respectfully represents that the evidence as to the passage of said title rests in various letters and documents emanating from the General Land Office, as well as in the act of Congress of July 21, 1860, hereinabove mentioned; that some of the said letters and documents are included in the statements made by the United States circuit court of appeals for the eighth circuit to accompany the questions by that court certified to this Court for instructions; that various other letters, documents, and matters of testimony appear in the full record of said cause which are not included in the statements so made by the said circuit court of appeals, but which, plaintiff in error respectfully submits, are important to the full consideration of the questions presented.

The plaintiff respectfully represents unto the Court that no patent was ever issued for the lands in controversy for the reason, as assigned by the General Land Office, that the

act of June 21, 1860, did not provide for a patent: that there was no general law providing for the issuance of patents in cases such as this, and that the act of Congress aforesaid, in connection with the approved survey, fully conveyed the title to the grantees named in the act of Congress.

And plaintiff in error respectfully represents unto the Court that in construing the terms of the approval of the survey of said lands by the General Land Office and in determining whether the General Land Office intended that such approval should be final and complete as to all lands not then known to be mineral the following evidence, appearing in the complete Record and not certified to this Court by the circuit court of appeals aforesaid, should be considered by this Court, to wit:

(1.) The field-notes of the original survey of said Baca grant No. 4, and especially the general description of the said lands and as to the mineral or non-mineral character of the same contained in said field-notes, which said field-notes are set out in full as Exhibit No. 6, appearing at pages 46 to 61 of the certified copy of the complete Record herewith submitted, and which field-notes were duly approved by the surveyor general of Colorado and Utah on the 15th day of March, 1864.

(2.) A certain letter of instructions, issued by the General Land Office under date of July 26, 1860, as to the method of carrying out the provisions of the act of July 21, 1860, which said letter appears at page 33 of the complete Record.

(3.) Extracts from the report of the Secretary of the Interior transmitted by the President with his annual message to Congress under date of December 5, 1864, being a portion of Executive Document No. 1 of the House of Representatives, Thirty-eighth Congress, second session, and being,

to wit, Exhibit No. 21, appearing on pages 104 and 105 of the certified copy of the Record, reporting the survey and approval thereof of Baca grant No. 4 and giving the acreage thereof.

(4.) Extract from the report of the surveyor general of the State of Colorado, included in the annual report of the Secretary of the Interior aforesaid, the same being set forth as Exhibit No. 22, at page 105 of the certified copy of the complete Record.

(5.) A certain original exhibit, being a map accompanying the report of the Secretary of the Interior for the year 1864, showing Baca grant No. 4 as segregated from the public domain, set forth at page 105 of the printed Record.

(6.) A like map showing Baca grant No. 4 as segregated from the public domain, issued by authority of the General Land Office, of date October 2, 1866, the same being original Exhibit No. 23, accompanying the original complete Record.

(7.) Exhibit No. 24, being an extract from the report of the Commissioner of the General Land Office for the year 1866, recognizing that the title to Baca float No. 4 had passed from the Government to private individuals.

(8.) Exhibit No. 25, as shown at page 107 of the printed Record, being a map issued November 5, 1868, under the authority of the General Land Office, showing Baca grant No. 4 segregated from the public domain.

(9.) Exhibit No. 28, showing a list of private claims and including said Baca grant No. 4, set forth in the official report of the Commissioner of the General Land Office, bearing date in 1869, and appearing in full at pages 111 to 113 of the certified copy of the complete Record.

The plaintiff in error further respectfully represents unto the Court that in the oral evidence submitted in said cause in the trial court and as shown by the complete Record it is made to appear that the plaintiff in error and his grantors have been in the actual and continuous possession of said Baca grant No. 4 for more than thirty years, and for more than twenty-five years have been using the same for agricultural and pastoral purposes; that three-fourths of the body of land comprising said grant (which, by law, was required to be taken in a square form) consists of level grazing and agricultural lands in the valley of the San Luis, and that the northeast corner thereof extends into the Sangre de Cristo mountains, where is found the only timber upon the granted premises, and in which are also found the headwaters of the streams upon which the plaintiff in error and his grantors have relied for the irrigation of the agricultural lands below.

That it also appears from the evidence submitted in said cause, as will appear from an inspection of the complete Record, that the said entire grant of nearly one hundred thousand acres has been for more than fifteen years under fence, said fence extending from the precipitous mountains on the north line, about two miles and a half west of the northeast corner, thence westerly nine miles and a half to the northwest corner, thence southerly twelve miles to the southwest corner, thence easterly twelve miles to the southeast corner, and thence northerly a little more than four miles to the precipitous mountains which mark the northeast corner of the grant, and that by means of said fence, together with the mountains on the northeast corner, the whole of said grant has since the year 1881 been enclosed by the plaintiff in error and his grantors, as is fully set forth in the evidence of George H. Adams, appearing on page 93 of the certified copy of the Record.

That it further appears from the evidence contained in said complete Record that the plaintiff in error and his

grantors have not only been in possession of said premises, as hereinabove mentioned, but have been continuously paying State and county taxes thereon and on the whole thereof, and that such taxes from the year 1877 down to the time of the trial of this cause so paid by the plaintiff in error and his grantors amounted to more than sixty-six thousand dollars, said taxes being paid upon the whole of said grant, including the particular portion thereof in controversy in this suit. The evidence concerning the payment of said taxes appears at page 102 of the certified copy of the Record.

And the plaintiff in error respectfully represents unto the Court that the various matters herein mentioned are important and should be considered by this Court in connection with the other matters set forth in the statement heretofore certified to this Court by the circuit court of appeals for the eighth circuit.

Wherefore the plaintiff in error, pursuant to the second paragraph of the 37th rule of this Court, respectfully makes application to this Court that the whole record and cause may be sent up to it for its consideration; and the said plaintiff in error herewith submits a certified copy of said entire record, in compliance with the provisions of said rule 37.

Respectfully submitted.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Attorneys for Plaintiff in Error.

UNITED STATES OF AMERICA:

IN THE SUPREME COURT, OCTOBER TERM, A. D. 1895.

QUINCY A. SHAW, *Plaintiff in Error,*
vs.
MURRAY M. KELLOGG, *Defendant in Error.* } No. 962.

Notice.

To the above-named defendant in error, Murray M. Kellogg, and to John R. Smith, Esq., his attorney.

GENTLEMEN: You will please take notice that in the above-entitled cause the plaintiff in error will, on Monday, April 27, 1896, apply to the Supreme Court of the United States for an order for the certification to that Court from the circuit court of appeals of the eighth circuit of the whole record in said cause, pursuant to the second paragraph of rule 37 of the Supreme Court of the United States.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Attorneys for Quincy A. Shaw, Plaintiff in Error.

Service of the foregoing notice is hereby acknowledged on behalf of the defendant in error this 17th day of April, 1896.

JOHN R. SMITH,
Attorney for Murray M. Kellogg, Defendant in Error, 415 Charles Bld'g, Denver, Colorado.

No. 154.

Stipulation as to Exhibits.

Filed Feb. 23, 1898.

In the Supreme Court of the United States

OCTOBER TERM, 1897.

No. 154.

QUINCY A. SHAW, PLAINTIFF IN ERROR,

vs.

MURRAY M. KELLOGG, DEFENDANT IN ERROR.

STIPULATION.

It is hereby stipulated by and between the parties to the above-entitled cause that the following original exhibits, transmitted by plaintiff in error to the clerk of the Supreme Court of the United States, to wit—

No. 15. Photograph of Crestone mountains, at the initial corner of Baca grant No. 4;

No. 16. Photograph of Crestone mountains, adjacent to grant;

No. 25. Transcript of part of official map of Colorado for the year 1868;

No. 29. Plat prepared by Prof. P. H. Van Diest, showing lands adjacent to initial corner;

No. 34. Plat of "Completion survey" of N. E. corner of Baca grant No. 4;

No. 35. Manual of instructions to surveyors general, of date February 2, 1855;

No. 40. Hayden's geological and topographical map for part of Colorado;

No. 41. Official map of Colorado for the year 1892—

are the original exhibits, of corresponding numbers, used upon the trial of said cause in the circuit court for the district of Colorado, and are the exhibits described on page 150 of the printed record on file in this court, and that the same may be considered by the court as if directly certified by the clerk of the United States circuit court of appeals for the 8th circuit.

It is hereby further stipulated and agreed that the following original exhibits, designated at page 150 of said printed record, are not necessary for the consideration of the issues now submitted to the Supreme Court of the United States, and that the said cause may be heard and determined without the use of said exhibits, to wit:

No. 22½. Official map of the United States, accompanying the report of the Secretary of the Interior for the year 1864.

No. 23. Official map of Colorado for the year 1866.

No. 36. Card-board model, and parts thereof, showing profiles of mountains near initial corner.

No. 37. Plat of profiles, on natural and exaggerated scale, prepared by Mr. Duval.

No. 38. Plat of profiles, on exaggerated scale, prepared by Mr. Duval.

No. 39. Map of Baca grant No. 4, showing mountains at N. E. corner, as determined by the witness Darby.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Attorneys for Plaintiff in Error.
JOHN R. SMITH,
Attorney for Defendant in Error.

[Endorsed:] Case No. 16,252. Supreme Court U. S., October term, 189–. Term No., 154. Quincy A. Shaw, P. E., *vs.* Murray M. Kellogg. Stipulation in regard to exhibits. Filed Feb'y 23, 1898.

DENVER, COLORADO, *February* 18, 1898.

Hon. JAMES H. MCKENNEY,
Clerk U. S. Supreme Court, Washington, D. C.

DEAR SIR: We send you today by express twenty-five copies of a reply brief in the case of Quincy A. Shaw *vs.* Murray M. Kellogg, No. 154.

We also send two packages of original exhibits in the same case—one, a roll containing original exhibits No. 25, transcript of part of official map of Colorado for the year 1868; No. 29, plat prepared by Prof. P. H. Van Diest, showing lands adjacent to initial corner; No. 40, Hayden's geological and topographical map for part of Colorado; No. 41, official map of Colorado for the year 1892. The other package contains the following exhibits: No. 15, photograph of Crestone mountains, at the initial corner of Baca grant No. 4; No. 16, photograph of Crestone mountains adjacent to grant; No. 34, plat of "Completion survey" of northeast corner of Baca grant No. 4; No. 35, manual of instructions to surveyors general, of date February 2, 1855; No. 39, map of Baca grant No. 4, showing mountains at northeast corner of grant as determined by the witness Darby.

We inclose herewith a stipulation of counsel relating to these exhibits. After the case was sent up on certificate to the Supreme Court from the court of appeals these exhibits were returned by the clerk of that court to Denver, and we assume that it is sufficient now to forward them direct to you, with a stipulation as to their identity.

It is not probable that any of these exhibits are necessary for the consideration of the questions before the court; but as they constitute a part of the record, we have thought it best to send them.

There are, however, certain exhibits which are of no value except for use in oral argument and for ocular demonstration, as for example, No. 36, a card-board model, and Nos. 37 and 38, plats of profiles. No. 22½, an official map of the United States, is merely cumulative, as to other maps, and is amply covered by the evidence, as is also No. 23, official map of Colorado for 1866. The same may be said of No. 39, map of Baca grant No. 4, showing mountains at northeast corner.

We have therefore provided in the stipulation that these original exhibits are not necessary, and that the cause may be heard and determined without them. They are simply cumulative in the evidence they furnish. We would say, however, that we included No. 39 in the stipulation, because at the time of drafting the stipulation this map had been mislaid, but has since been found. As it may be useful for the court to have this map, which shows the entire grant as well as the mountains in the northeast corner, we include the same in the documents today transmitted to you by express.

If, under the practice of the court, it is necessary for this stipulation to be put in printed form, will you kindly have that done, and advise us of the expense, and if any further remittance is necessary we shall promptly comply with your demands.

We understand this case is now ready for submission to the court pursuant to the order made in December. We should

be very much obliged to you if you would call the matter immediately to the attention of the Chief Justice, so that the case may be promptly placed in the hands of the judges.

It is a matter of very great importance to us that this case should be determined this spring; and in the event of a decision adverse to us, we shall hope to have a decision in time for us to make, if it seems advisable, an application for a rehearing before the close of the present term of court.

We shall be personally obliged to you if you will do what you can to facilitate the prompt submission of the cause.

Very respectfully yours,

WOLCOTT VAILE.